TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted] 1916

No. [redacted] 321

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES WINFIELD.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

[redacted]

(25,045)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 762.

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vs.

JAMES WINFIELD.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print
Caption	*a*	1
Record on appeal to the court of appeals	1	1
Statement under rule 41	1	1
Employee's notice of injury	2	2
Employee's notice of injury to commission	3	3
Employee's notice of injury to employer	5	4
Employee's claim for compensation	6	5
Employer's first report of injury	10	7
Attending physician's report	13	9
Notice of hearing for adjustment of claim	15	10
Employer's affidavit of James Winfield	18	11
Eugene Bronk	19	12
George W. Vaughn	20	12
A. A. Stern, M. D.	21	13
James R. Nelson, M. D.	22	14
Minutes of hearing	23	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1915.

	Original.	Print
Affidavit of James Winfield	24	15
Employer's requests to find	25	15
Decision and award of commission	28	17
Employer's notice of exceptions	31	18
Employer's notice of appeal	34	20
Stipulation waiving certification	35	20
Affidavit of no opinion by commission	36	21
Order of chairman to file with the appellate division	37	21
Order settling and filing case	37	21
Appellate division opinion for affirmance	38	22
Dissenting opinion, Smith, P. J.	45	25
Appellate division order of affirmance	48	27
Commission's order of affirmance	50	28
Employer's notice of appeal to the court of appeals	52	29
Stipulation waiving certification	54	29
Supplemental record on appeal to court of appeals	55	30
Employer's application, June 23, 1914	56	30
Employer's letter of transmission, June 23, 1914	61	33
Employer's letter to commission, June 26, 1914	63	34
Commission's letter to employer, June 29, 1914	65	35
Employer's letter to commission, July 1, 1914	66	35
Commission's letter to employer, July 21, 1914	68	36
Employer's undertaking, July 21, 1914	69	37
Employer's agreement, July 21, 1914	72	39
Stipulation as to supplemental papers on appeal	74	39
Stipulation to papers on appeal, etc.	75	40
Remittitur from court of appeals	76	40
Judgment on remittitur from court of appeals	79	42
Opinion of court of appeals, Seabury, J.	82	43
Stipulation as to record	95	50
Clerk's certificate	98	51
Clerk's return to writ of error	99½	52
Prayer for reversal	100	53
Petition for a writ of error	101	53
Assignment of errors	107	57
Writ of error	119	58
Citation and service	122	59
Bond on writ of error	124	60
Certificate of lodgment	129	63

a In the Court of Appeals of the State of New York.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

Papers on Appeal from Order Affirming Award of Workmen's Compensation Commission.

Visscher, Whalen & Austin, Attorneys for Appellant, 19 Tweddle Building, Albany, N. Y.

Brinnier & Canfield, Attorneys for Respondent, 53 John St., Kingston, N. Y.

Hon. Egburt E. Woodbury, Attorney General, Capitol, Albany, N. Y.

Hon. Jeremiah F. Connor, Counsel to Compensation Commission, 1 Madison Avenue, New York City.

1 Supreme Court, Appellate Division, Third Judicial Department.

State Workmen's Compensation Commission.

Claim No. 21925.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

Statement Under Rule 41.

1914.

August 11. Injury occurred.
22. Notice of injury served by employee.
28. Notice of injury served by employee.
28. Employee's claim for compensation served.
Sept. 8. Notice of injury served by employer.
18. Notice of hearing served upon employer.
23. Hearing before Commission.
Oct. 27. Adjourned hearing before Commission.
Nov. 17. Decision rendered and award made.
Dec. 11. Notice of decision and award served upon employer.
19. Employer's exceptions and notice of appeal served.

There has been no change in parties, named as above.

2 *Employee's Notice of Injury.*

To The State Workmen's Compensation Commission and New York Central & Hudson River Railroad Company:

Take Notice, That I hereby notify you, in pursuance *to* Section 18 of the Workmen's Compensation Law,

1. That I was in the employ of said New York Central and Hudson River Railroad Company on August 11th, 1914, and had been in such employ for six or seven years off and on prior thereto.

2. That I was paid $1.70 per day for such service.

3. That I was injured while performing my duty as such employee on said date aforesaid and at about 1-30 P. M. I was tamping ties at about between the Lake Katrine Station and the Saugerties Road crossing in the Town of Ulster, Ulster County, N. Y., and I had a pick and was tamping stones under ties and had struck the pick against the ground and stones and a pebble or a piece of stone rebounded and flew up and struck my right eye.

4. I have been attended by Dr. A. A. Stern of 22 East Strand, Kingston, N. Y., at the expense of such Railroad Company. I have also consulted Dr. James R. Nelson of 23 Main Street, Kingston, N. Y., an eye specialist, at my own expense.

5. That both of said Doctors inform me that I have an ulcer on the eye caused by such pebble or stone striking it, and that I will in all probability lose the said right eye and permanently lose the sight thereof.

6. That I am totally disabled and will be for a long time and will always be partially disabled by the loss of such eye.

3 7. That I am 57 years of age and my hearing is good and my eyesight was good prior to said accident, and I reside at No. 81 Garden Street, Kingston, N. Y., with my wife and grandson who are dependent upon me.

8. I hereby make claim for compensation for such injury and disability as provided by law and said Workmen's Compensation Act.

Dated at Kingston, N. Y. August 22nd, 1914.

JAMES WINFIELD, *Claimant,*
81 *Garden Street, Kingston, N. Y.*

Employee's First Notice of Injury to Commission.

Form C-1.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 21925.
Case of James Winfield.

Full name of injured employee, James Winfield; Address, 81 Garden St., Kingston, N. Y.

Name of employer, New York Central & H. R. R. R. Co. Address, Grand Central Station, N. Y. C.

Address where accident happened, between Lake Katrine and Saugerties Rd. crossing Town of Ulster, Ulster County, N. Y. Date of accident, August 11th, 1914, at 1:30 P. M.

4 Cause of accident, was tamping ties and a stone or pebble flew up and struck my right eye.

Nature and extent of injury, right eye badly injured will probably lose it.

Are you likely to be disabled more than two weeks? (Careful answer must be given) Yes.

Have you notified your employer? Yes. When? Directly after accident and on or about Aug. 21st by written notice.

How? (By delivery of notice or by registered letter) by registered letter. What was your daily wage? $1.70.

Where are you now? 81 Garden St., Kingston, N. Y.

Did you request your employer to furnish medical service? Yes. Has he done so? not satisfactory, went to Dr. A. A. Stern, E. Strand, Kingston, three times at request of employer or company before he would bandage eye or prescribe for it.

Name of attending physician. Am attended now by Dr. J. R. Nelson, an eye specialist, 23 Main St., Kingston, N. Y.

Signed, this 28th day of August, 1914. (Sign here) James Winfield (full name), at Kingston, N. Y. Address to which mail should be sent, 81 Garden Street.

5 *Employee's First Notice of Injury to Employer.*

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. —.

Case of —.

N. Y., August 28, 1914.

New York Central & Hudson River R. R. Co. (employer), Grand Central Station, New York City (address):

I hereby notify you, as required by law, that I was injured at 1:30 P. M. on the 11th day of August, 1914, at between Lake Katrine Station and West Shore Railroad Crossing, Town of Ulster, Ulster Co., N. Y.

My injury was caused by a stone or pebble rebounding and flying up and striking my right eye as I was tamping ties.

The nature and extent of my injury is that I will probably lose use of right eye and eyesight thereof.

I am now at 81 Garden Street, Kingston, N. Y.
(State where at present.)

I am being attended by Dr. James R. Nelson, 23 Main St., Kingston, N. Y., and I now request, as required by law, that you supply me with medical attendance by said doctor or some other eye specialist. That your agent sent me to Dr. A. A. Stern, Kingston, N. Y., but he refused to bandage it or prescribe for it until I went three times and he is not an eye specialist. I have previously sent you written notice.

(Sign here) JAMES WINFIELD.
(Full name.)

Address to which mail should be sent 81 Garden Street, Kingston, N. Y.

6 *Employee's Claim for Compensation.*

Form C-3.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 21925.

Case of James Winfield.

INSTRUCTIONS.—To facilitate prompt payment of compensation the injured employee, or someone for him, should write carefully (using ink or indelible pencil) answers to the following questions, and mail the same directly to the Commission within four weeks after date of injury.

I hereby make claim for compensation for an injury resulting in my disability, due to an accident upon the 11th day of August, 1914, arising out of and in the course of my employment by New York Central & Hudson River Railroad Company, of New York City, New York.

My claim is:

If Totally Disabled: From what date? August 11, 1914. Are you now disabled? Yes. If not, on what date were you able to return to work? —. If still disabled, how long do you estimate disability will continue? Probably of long duration, will probably be partially disabled permanently.

If Mutilated: Thumb First Finger? —. Second finger? —. Third finger? —. Fourth finger? —. Phalange of thumb or finger? —. If so, which? —. Great toe —. Other
7 toe? —. Phalange of toe? —. Of which? —. Hand? —. Arm? —. Foot? —. Leg? —. Eye? Yes, right eye. Both eyes? —. Did you suffer loss of the member, or loss of use of the member? Will probably lose right eye. If loss of use, is such loss temporary or permanent? Will probably lose right eye as I am informed by attending physician.

If Partially Disabled: From what date? —— —, 191–. Are you still so disabled? —. If not, on what date did disability cease? —— —, 191–. If still partially disabled, how long do you estimate disability will continue? —. By how much have your daily earnings been reduced by this injury? —. and for such other and further relief as I may be entitled in consequence of such injury.

Place of Accident.

In proof of such claim I make the following statements:

Location of plant where accident occurred on railroad between Lake Katrine Station and Saugerties Road Crossing. In what city

or village? Town of Ulster. County? Ulster. If away from employer's premises or plant, state where accident happened? —.

The Injured Employee.

Full name of injured employee? James Winfield.
Address? 81 Garden Street, Kingston, N. Y.
Sex? Male. Age? 57. Do you speak English? Yes. If not, what language? —. Are you married or single? Married.
Where were you born? Town of Esopus, Ulster County, N. Y.
8 State occupation when injured? Section hand. How long have you worked at this occupation? Six or seven years. How long have you worked for present employer? Six or seven years. Were you doing your regular work when injured? Yes. Piece or time worker? $1.70 for 10 hrs. Wages, or average earnings, per day? $1.70.
Describe how accident occurred. I was tamping ties with a pick and had struck the pick against the ground and a pebble or small stone rebounded and flew up and struck my right eye. Were safeguards provided for? —. If so, was accident caused by removal of any safeguards? —. Was your eyesight or hearing defective? No.

Medical Attendance.

Did you request your employer to provide medical attendance? Yes. Has he done so? Not satisfactory. What physician attended you? Agent of Company directed me to go to Dr. A. A. Stern, Kingston, and he refused to treat me the first two times I went to him. I am now being attended by Dr. James R. Nelson, an eye specialist. Address of physician, 23 Main Street, Kingston, N. Y. Were you sent to hospital? No. If so, name and address of hospital? —. Where are you now? 81 Garden Street, Kingston, N. Y.
If married, give full name, address, and age of wife or husband? Sarah E. Winfield, wife, age, 56 years, 81 Garden St., Kingston, N. Y. If living with mother or father, give their name and address?
I hereby agree to accept the compensation awarded by the State Workmen's Compensation Commission in lieu of any other
9 right or cause of action which I may have against any person, firm or corporation, in consequence of such accident; and, in consideration of such compensation, if any, when awarded, I hereby assign and set over unto the State Workmen's Compensation Commission, for the benefit of the State Insurance Fund, if compensation be payable therefrom and otherwise to the person or association or corporation liable for the payment of such compensation, all my right, title and interest, if any, in such cause of action for such injury, loss, or damage against any person, firm, or corporation.
Signed, this 28th day of August, 1914, at Kingston, N. Y.
(Injured employee making claim, sign full name here:)
JAMES WINFIELD.

(Give address to which mail should be sent:) 81 Garden Street, Kingston, N. Y.

STATE OF NEW YORK,
County of Ulster, ss:

On this 28th day of August, 1914, personally appeared before the undersigned, a Notary Public in and for the said County and State, the above named James Winfield to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name hereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment.

[SEAL.] PALMER CANFIELD,
Notary Public.

Post-office Address 53 John Street, Kingston, N. Y.

10 Form C-2.

Employer's First Report of Injury.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 21925.

Case of James Winfield.

INSTRUCTIONS.—The employer must fill out this form and return same to the Commission, at its New York Office, within ten days after every accident which causes any loss of work or requires medical attendance. (See penalty, Sec. 111 of the law printed on the back hereof.) In filling out this form use pen or typewriter.

Employer, Place, and Time.

Employer's name: New York Central and Hudson River Railroad Co.

Office address: Grand Central Terminal, New York City.
(Street and number, city or village and county)

Business, goods produced, work done or kind of trade or transportation: Steam railroad.

Location of plant or place of work where accident occurred: Between Lake Katrine and Kingston.
(Street and number)

In what city or village: Kingston. County: Ulster.

Date of accident 11th day of August, 1914; hour of day: 1:30 P. M.

Did accident happen on the premises? Yes. At the plant?..
11 Away from the plant of employer?....
If away from the plant state where.....

Was employee injured in course of employment? Yes.

The Injured Employee.

Give full name of injured employee James Winfield.
Address 81 Garden St., Kingston, Ulster County, N. Y.
(Street and number, City or village and County)
Sex Male. Age 58. Speak English?..... If not, what language?.....
Occupation when injured? Section Laborer.
Was injured employee doing his regular work? Yes. If not, what work?.....
How long was injured person in your employment? Off and on for six or seven years.
Piece or time worker? Time. Wages or average earnings per day? $1.70.

The Injury.

Describe in full how the accident occurred, while tamping ties with ballast pick, piece of ballast struck him in right eye.
State nature and extent of injury. Ulcer of cornea, with cornea inflamed; inflam-ation of iris and inflam-ation of uvea, right eye.
(If amputation was necessary, state what part amputated.)

Medical Attendance.

Was medical attendance provided by you? Yes.
How soon after accident? August 13th or 14th.
Name and address of physician, A. A. Stern, Kingston, N. Y.
To what hospital was employee sent? None.
12 Address of hospital.....
If not sent to hospital, where is he? A. At home.
Are you still providing medical attendance? Yes.
If injured employee has already returned to work, give date of return..... If so, is he fully recovered and earning full wages?.....
How many working days did he lose on account of accident? .....
If not returned to work, probable length of disability, unknown.
(Give your best estimate.)
Is injured employee married or single? Married.

Insurance.

Is insurance carrier in the State Fund? No. If not, in what company or association? Self insured. Injured man engaged in interstate commerce.
Signed, this 8th day of Sept. 1914, at New York, N. Y.
Firm name New York Central and Hudson River Railroad Co.
Signed H. H. Downs. Official title Chief Claim Agent.

SECTION 111. Record and Report of Injuries by Employers.—Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment.

Within ten days after the occurrence of an accident resulting in personal injury, a report thereof shall be made in writing by the employer to the Commission, upon blanks to be procured from
13 the Commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the Commission. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

NOTICE.—If injured employee is not fully recovered before this notice is sent by you, the Commission will send you form No. C-11 for 2nd notice; report thereon at proper time. (See instructions thereon.)

Attending Physician's Report.

Form C-4.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 21925.

Case of James Winfield.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its New York City Office.

1. Name of injured person, James Winfield. Address, 81 Garden Street, Kingston, N. Y.
14 2. Date of accident, August 11, 1914 at 1:30 P. M. Was first treatment rendered by you? August 22nd, 1914.
3. If not, by whom? Dr. Alex Stern. Address, 22 E. Strand St., Rondout.
4. If an assistant, consultant or anæsthetist was necessary, give name and address.
5. Who furnished necessary medical supplies? Connelly Drug Co. Was a nurse ordered by you? No.
6. Name of nurse.....
Address.....
7. Was injured person removed to hospital? No.
Name of hospital.....
Address.....
8. Give an accurate description of the nature and extent of the injury? Struck in right eye by stone while tamping ties on West

Shore R. R. causing an ulcer of the cornea which became infected, resulting in Keratitisivitis and uvetis with hypertropion.

9. Describe the treatment? Hot water application—atropia sulp.—and at night *acetainled* for relief of severe pain.

10. Are the symptoms from which he is suffering due entirely to this injury? Yes.

11. Is....he able to attend to any part of present or any other occupation? No.

12. Has the injury resulted in a permanent disability? Yes. If so, what? Cornea nearly covered by dense opacity and probable necessity of mucleation.

13. Has previous sickness or injury contributed to his disability? No. If so, to what extent?.....

14. Is there evidence of syphilis? No. Tubercular infection? No. Alcoholism? No. Any infectious disease? No. Occupational disease? No. Neurasthenia? No. Hypochondriasis? No.

15 Hysteria? No. Exaggeration? No. Is there evidence of malingering? No.

15. For what period, from the date of accident, is disability likely to exist? Long duration.

16. State, in patient's own words, how accident occurred. At about 1:30 P. M. August 11th, while bending over and looking downward, using the tamping iron, was struck by a stone flying upward while tamping ties working as a section hand on the West Shore R. R. between Lake Katrine Station and Kingston.

J. R. NELSON,
Attending Physician,
23 *Main Street, Kingston, N. Y.*

Graduate of Columbia P. & S., N. Y. Year 1869.
Date Sept. 1st, Kingston, N. Y., 1814.

Notice of Hearing for Adjustment of Claim.

Form C-78.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 21925.

Case of James Winfield.

James Winfield, (Claimant) 81 Garden Street, Kingston, N. Y.
New York Central & Hudson R. R. R. Co., Employer.

16 Grand Central Terminal, New York City, N. Y., Self insurer (Insurer).

GENTLEMEN: You are hereby notified of the claim of James Winfield, for compensation arising out of injuries sustained by him, aris-

ing out of and in the course of his employment by the above employer, which claim is as follows:

Copy of Employee's Claim.

If Totally Disabled: From what date? August 11, 1914. Are you now disabled? Yes. If not, on what date were you able to return to work? .....191... If still disabled, how long do you estimate disability will continue? Probably of long duration; will probably be partially disabled permanently.

If Mutilated: Thumb?..... First Finger..... Second finger?..... Third finger?..... Fourth finger?..... Phalange of thumb or finger?..... If so, which..... Great toe..... Other toe? ..... Phalange of toe?..... Of which?..... Hand?..... Arm?..... Foot?..... Leg? ..... Eye? Yes; right eye. Both eyes?..... Did you suffer loss of the member, or loss of use of the member? Will probably lose right eye. If loss of use, is such loss temporary or permanent? Will probably lose right eye as I am informed by attending physician.

If Partially Disabled: From what date?..... 191.... Are you still so disabled..... If not, on what date did disability cease?.....191.. If still partially disabled, how long do you estimate disability will continue?.....

17 By how much have your daily earnings been reduced by this injury?.....and for such other and further relief as I may be entitled to in consequence of such injury. My average daily wages were $1.70.

The Claim has been set for hearing and will be heard at No. 1 Madison Avenue, New York City, N. Y., on the 23rd day of September, 1914, at 10 o'clock A. M., and you are hereby further notified that at said time and place the State Workmen's Compensation Commission of the State of New York will proceed to hear and dispose of the said claim in the manner provided by law.

Dated at New York, N. Y., this 18th day of September, 1914.

Witness:

STATE WORKMEN'S COMPENSATION COMMISSION OF THE STATE OF NEW YORK,
By A. J. DIERKS.

NOTE.—Upon a hearing pursuant to this Section either party may present evidence and be represented by Counsel. Workmen's Compensation Law, Sec. 20, Chapter 41, Laws of 1914.

18 *Employer's Affidavit of James Winfield.*

STATE OF NEW YORK,
County of Ulster, ss:

James Winfield being duly sworn deposes and states, that he resides at 81 Garden St., Kingston, New York, and on the 11th day of

August, 1914, was employed as track laborer on the New York Central & Hudson River Railroad Co., engaged in performing his regular and usual duties, at or near Lake Katrine, New York.

That his duties consist of putting in new and removing old ties and switch timber, lining and ballasting track, and other general track repair and maintenance. That he was so engaged on or about the 11th day of August, 1914, and at the time of alleged injury, being at that specific time engaged in tamping ties in connection with lining and ballasting track.

That the tracks on which said deponent was at work was on main line track, over which through passenger and freight trains run.

JAMES WINFIELD.

Subscribed and sworn to before me this 5th day of October, 1914.

M. A. O'MAHONY,
Notary Public, Albany County.
Certificate Filed in Ulster County.

19 *Employer's Affidavit of Eugene Bronk.*

STATE OF NEW YORK,
County of Ulster, ss:

Eugene Bronk being duly sworn deposes and states, that he resides at 197 Elmendorf St., Kingston, New York and is employed by the New York Central & Hudson River Railroad Co., as section foreman, and was so employed on or about the 11th day of August, 1914, and had working in his gang one James Winfield who alleges to have been injured at or near Lake Katrine, New York on or about the 11th day of August, 1914.

That the said Railroad Company is engaged in carrying passengers and freight through the state of New York, from various other states and destined to various other states.

Deponent further states that the work account of which said James Winfield was engaged at time of alleged injury was in connection with general repair and maintenance of main line tracks over which pass through freight and passenger trains, carrying freight and passengers through New York State, from and to adjacent states.

EUGENE BRONK.

Subscribed and sworn to before me this 5th day of October, 1914.

M. A. O'MAHONY,
Notary Public, Albany County,
Certificate Filed in Ulster County.

20 *Employer's Affidavit of George W. Vaughan.*

STATE OF NEW YORK,
County of New York, City of New York, ss:

George W. Vaughn, being duly sworn, deposes and says, that he resides at Mount Vernon, County of Westchester, State of New York,

and that he is employed by the New York Central & Hudson River Railroad Company as Engineer Maintenance of Way, and that his duties as such, among other things, consist in the direction and control of forces employed in the Maintenance of Way Department, and particular connection with the repair and upkeep of the railroad right of way and tracks;

That the tracks located one and one-half miles east of Lake Katrine, N. Y., are the main tracks of the aforesaid railroad company and over which through trains, both passenger and freight, are operated, that is, trains from the State of New York into the State of New Jersey, and vice versa;

That said railroad company, in connection with the maintenance of said tracks, is engaged in interstate commerce, and that any employes working on said tracks are so engaged.

This affidavit is made for submission to the Workmen's Compensation Commission of the State of New York in connection with claim of James Winfield, section laborer, for compensation on account of injuries sustained at or near Lake Katrine, N. Y., August 11th, 1914.

GEO. W. VAUGHAN.

Sworn to before me this 9th day of October, 1914.

F. W. DUERR,
Notary Public, New York County, #863.

21 *Employer's Affidavit of A. A. Stern, M. D.*

STATE OF NEW YORK,
County of Ulster, ss:

A. A. Stern, being duly sworn, deposes and states, that he is a practicing physician and surgeon with office at 22 East Strand St., Kingston, New York.

That he attended one James Winfield, alleged to have been injured at or near Lake Katrine, New York, on or about the 11th day of August, 1914. I first saw him on August 19th, 1914 and subsequent dates as follows:

Aug. 20th, Aug. 21st and Aug. 27, 1914.

That deponent's diagnosis of injuries to James Winfield consisted of at that time of a very severe kerato iritis of the right eye with considerable amount of pus in the anterior chamber, this condition being due to neglect of laceration of the cornea. He having had no medical attendance prior to Aug. 11th.

A. A. STERN, M. D.

Subscribed and sworn to before me this 5th day of October, 1914.

M. A. O'MAHONY,
Notary Public, Albany County.
Certificate Filed in Ulster County.

22 *Employer's Affidavit of James R. Nelson, M. D.*

STATE OF NEW YORK,
County of Ulster, ss:

James R. Nelson being duly sworn deposes and states, that he is a practicing physician and surgeon, that he resides at 23 E. Main St., Kingston, N. Y.

That he attended one James Winfield alleged to have been injured at or near Lake Katrine, N. Y. on or about the 11th day of August 1914, first, on August 22nd 1914, and that he is still attending him.

That deponent's diagnosis of injuries to James Winfield consisted of Ulceration of the Cornea with deep seated inflam-ation, Iritis and Uvetis resulting in the loss of the sight of the right eye. When he first attended the said James Winfield there was Hypertropion or pus in anterior chamber with ulceration covering greater part of the cornea.

JAMES R. NELSON, M. D.

Subscribed and sworn to before me this 5th day of October, 1914.

M. A. O'MAHONY,
Notary Public, Albany County.
Certificate Filed in Ulster County.

23 *Minutes of Hearing.*

Hearing of the State Workmen's Compensation Commission, Held at the Office of the Commission, No. 1 Madison Avenue, Borough of Manhattan, City of New York, on Tuesday, October 27, 1914, at Ten O'Clock A. M.

There were present: John Mitchell, Howard T. Mosher, J. Mayhew Wainwright, constituting a quorum.

Commissioner John Mitchell took the Chair.

The Chairman called the meeting to order.

Claim No. 21925, James Winfield.

On motion of Commissioner Mosher, seconded by Commissioner Wainwright, it was

Resolved: That Claim No. 21925, James Winfield, be referred to Counsel together with other railroad cases.

The vote on the foregoing resolution was as follows:

John Mitchell, aye,
Howard T. Mosher, aye,
J. Mayhew Wainwright, aye,

making the vote unanimous.

24 *Affidavit of James Winfield.*

Re Claim No. 21925.

JAMES WINFIELD
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

COUNTY OF ULSTER, *ss:*

James Winfield, being duly sworn, deposes and says, that he is the claimant above mentioned; that he received injuries to his right eye while in the employ of the said New York Central & Hudson River Railroad Company, on August 11th, 1914; that deponent has lost the total and permanent use of the sight of said right eye and has become totally and permanently blind in said eye.

JAMES WINFIELD.

Sworn to before me this 27th day of November, 1914.

CHRIS. J. FLANAGAN,
Notary Public.

To State Workmen's Compensation Commission and New York Central & Hudson River Railroad Company.

25 *Employer's Requests to Find.*

State Workmen's Compensation Commission.

Claim No. 21925.

In the Matter of JAMES WINFIELD, Employee,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer.

The employer, The New York Central and Hudson River Railroad Company, herewith submits the following proposed decision, and requests the Commission to make findings of fact and conclusions of law, as follows:

Findings of Fact.

1. The above named James Winfield (hereinafter designated as the employee), at about half-past one in the afternoon of August 11, 1914, while employed as a section hand by the above named New York Central and Hudson River Railroad Company (hereinafter designated as the employer), sustained injuries which resulted in the loss of sight of his right eye.

2. At the time when said employee sustained said injuries, said

employer was a common carrier by railroad, and as such common carrier was engaged in commerce between the State of New York and the State of New Jersey.

3. At the time when he sustained said injuries said employee, as such section hand, was engaged in performing his usual duties, at or near Lake Katrine, in the County of Ulster and State of
26 New York, which duties consisted in removing old and putting in new ties and switch timbers along and under a main line track of said employer, in lining and ballasting said track, and otherwise repairing and maintaining said track.

4. Over said track said employer, at the time when said employee sustained said injuries, was accustomed to run and operate trains, carrying passengers and freight in transit between points in the State of New York and points in the State of New Jersey, and between points in the State of New Jersey and points in the State of New York.

5. When said employee sustained said injuries he was engaged in tamping ties under the rails of said track, and while so engaged said employee was struck in the right eye by a stone or pebble which rebounded from the ballast, of which said stone or pebble formed a part, between said ties, struck said employee in his right eye and caused the injuries for which said employee claims compensation herein.

Conclusions of Law.

First. While acting in the course of his employment as such section hand, said employee was engaged by said employer in commerce between the States of New York and New Jersey.

Second. When he sustained said injuries, said employee was not engaged in intrastate commerce, within the provisions of section 114 of chapter 41 of the Laws of 1914 of the State of New York, entitled the "Workmen's Compensation Law."

Third. To award to said employee herein compensation under the provisions of said "Workmen's Compensation Law" will de-
27 prive said employer of its property without due process of law, and will deny to said employer the equal protection of the laws in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fourth. To award to said employee herein compensation under the provisions of said "Workmen's Compensation Law" will deprive said employer of its right to trial by jury, guaranteed to it by section 2 of Article I of the constitution of the State of New York.

Fifth. Said employee is not entitled to any award herein by this Commission, and the above entitled proceeding should be dismissed.

All of which is respectfully submitted.

Dated, December 4, 1914.

VISSCHER, WHALEN & AUSTIN,
Attorneys for The New York Central and Hudson River Railroad Company.

Office and Post-office Address, 19 Tweddle Building, Albany, N. Y.

28 *Decision and Award of Commission.*

State Workmen's Compensation Commission.

Claim No. 21925.

In the Matter of the Claim of JAMES WINFIELD for Compensation under Workmen's Compensation Law
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Self-insurer.

This claim came on for hearing before the Commission at the office of the Commission, No. 1 Madison Avenue, Borough of Manhattan, City of New York, on the 23rd day of October, 1914.

Appearances:

Jeremiah F. Connor, Esq., Counsel to Workmen's Compensation Commission.

Visscher, Whalen & Austin, of Albany, New York, Attorneys (W. H. Failing, of counsel) for Employer.

All the evidence submitted before the Commission having been heard and duly considered the Commission makes its Conclusions of Fact, Rulings of Law and Award as follows:

Conclusions of Fact.

29 (1) On August 11, 1914, the date of the accident, James Winfield, resided at 81 Garden Street, Kingston, N. Y., and on that date and for several years prior thereto he was employed by New York Central & Hudson River Railroad Company, a corporation of the State of New York with its principal office at Albany, New York, as a section hand.

(2) On said date, while James Winfield was working on the tracks of the Railroad Company at or near Lake Katrine, County of Ulster, N. Y., and was engaged in tamping ties in connection with ballasting the tracks, his pick struck the ground violently and a pebble or small stone rebounded and struck said Winfield in the right eye, causing an injury resulting in the loss of the sight of that eye.

(3) At the time of said accident, the Railroad Company was accustomed to operate trains over the tracks on which said Winfield was working, carrying passengers and freight in transit between points in the State of New York and points in the State of New Jersey, as well as between points wholly in the State of New York.

(4) The average weekly wage of James Winfield was the sum of Nine and 81/100 ($9.81) Dollars.

(5) The said injury sustained by James Winfield was an accidental injury, and arose out of and in the course of his employment, and was not caused solely by the intoxication of the said employee

while on duty and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

Rulings of Law.

This claim comes within the provisions of chapter 67 of the Consolidated Laws, being Chapter 86 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, and
30 amended by Chapter 316 of the Laws of 1914, known as the Workmen's Compensation Law.

Award.

Award of compensation is hereby made at the rate of Six and 54/100 ($6.54) Dollars weekly to James Winfield for the period of two weeks from August 25 to September 8, 1914, and this hearing is continued to October 7, 1914.

Dated, New York, November 17, 1914.

WORKMEN'S COMPENSATION COMMISSION.

——— ———, *Chairman;*
JOHN MITCHELL,
THOMAS DARLINGTON,
HOWARD T. MOSHER,
Commissioners.

Chairman Dowling not sitting.
Commissioner Wainwright dissenting.

31 *Employer's Notice of Exceptions.*

State Workmen's Compensation Commission.

Claim No. 21925.

In the Matter of JAMES WINFIELD, Employee,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer.

To The Attorney General of the State of New York.
The State Workmen's Compensation Commission.
Hon. Jeremiah F. Connor, counsel to said Commission.
James Winfield, Employee.
Messrs. Brinnier & Canfield, attorneys for said employee.

SIRS: Please Take Notice that the above named employer, the New York Central and Hudson River Railroad Company, hereby excepts as follows to the decision and award of the State Workmen's Compensation Commission herein, bearing date November 17th, 1914, as well as to the refusal of said Commission to make findings of fact and

conclusions of law, in accordance with the requests of said employer, bearing date December 4th, 1914, and filed with said Commission:

32 1. To the following ruling of law made by said Commission: "This claim comes within the provisions of chapter 67 of the Consolidated Laws, being Chapter 86 of the Laws of 1913, as reenacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, known as the Workmen's Compensation Law."

2. To the following award made by said Commission: "Award of compensation is hereby made at the rate of six and 54/100 ($6.54) Dollars weekly to James Winfield for the period of two weeks from August 25 to September 8, 1914, and this hearing is continued to October 7, 1914."

3. To the refusal of said Commission to make said employer's requested finding of fact numbered 1.

4. To the refusal of said Commission to make said employer's requested finding of fact numbered 2.

5. To the refusal of said Commission to make said employer's requested finding of fact numbered 3.

6. To the refusal of said Commission to make said employer's requested finding of fact numbered 4.

7. To the refusal of said Commission to make said employer's requested finding of fact numbered 5.

8. To the refusal of said Commission to make said employer's requested conclusion of law numbered first.

9. To the refusal of said Commission to make said employer's requested conclusion of law numbered second.

33 10. To the refusal of said Commission to make said employer's requested conclusion of law numbered third.

11. To the refusal of said Commission to make said employer's requested conclusion of law numbered fourth.

12. To the refusal of said Commission to make said employer's requested conclusion of law numbered fifth.

Dated, December 17th, 1914.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for N. Y. C. & H. R. R. R. Co.

Office and Postoffice Address, 19 Tweddle Building, Albany, N. Y.

34 *Employer's Notice of Appeal.*

State Workmen's Compensation Commission.

Claim No. 21925.

In the Matter of JAMES WINFIELD, Employee,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer.

To The Attorney General of the State of New York.
The State Workmen's Compensation Commission.
Hon. Jeremiah F. Connor, counsel to said Commission.
James Winfield, Employee.
Messrs. Brinnier & Canfield, attorneys for said employee.

SIRS: Take Notice that the above-named employer, The New York Central and Hudson River Railroad Company, hereby appeals to the Appellate Division of the Supreme Court, in and for the Third Judicial Department, from the decision and award of the State Workmen's Compensation Commission herein, which bears date November 17th, 1914.

Dated, December 17th, 1914.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for N. Y. C. & H. R. R. R. Co.

Office and Post-office Address, 19 Tweddle Building, Albany, N. Y.

35 *Stipulation Waiving Certification.*

Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

Stipulated, pursuant to the provisions of section 3301 of the Code of Civil Procedure, that the preceding printed copies of notice of appeal, decision and award of the State Workmen's Compensation Commission, and papers and records on file in the office of said Commission, which constitute all of the papers used, records filed and proceedings, including the evidence, taken before said Commission in the above entitled proceeding, and upon which said Commission acted in rendering said decision and award, are true and correct copies of the whole of the respective originals thereof now on file

in the office of said Commission, and that certification thereof is hereby waived.

Dated, December 29th, 1914.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
BRINNIER & CANFIELD,
Attorneys for Respondent.
JAMES A. PARSONS,
Attorney General.
JEREMIAH F. CONNOR,
Counsel to Compensation Commission.

36 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

STATE OF NEW YORK,
County of Albany, ss:

Robert E. Whalen, being duly sworn, says that he is one of the attorneys for appellant in this proceeding, wherein no opinion was written by the State Workmen's Compensation Commission.

ROBERT E. WHALEN.

Sworn to before me this 28th day of December, 1914.

EDNA M. SAGER,
Notary Public, Albany County, N. Y.

37 *Order of Chairman to File with the Appellate Division.*

Order Settling and Filing Case.

Pursuant to the foregoing stipulation, it is ordered, that the foregoing printed record is hereby settled as and for the record on appeal herein and is hereby ordered filed in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department.

Dated, New York City, Dec. 29, 1914.

ROBERT E. DOWLING,
Chairman of the State Workmen's Compensation Commission.

38 *Appellate Division Opinion for Affirmance.*

Supreme Court, Appellate Division, Third Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

Argued March Term, 1915.
Decided May Term, 1915.

Walter Lloyd Smith, Presiding Justice; John M. Kellogg, George F. Lyon, Wesley O. Howard, John Woodward, Associate Justices.

Appeal by the New York Central and Hudson River Railroad Company from the Decision of the State Workmen's Compensation Commission, Dated November 17, 1914.

Visscher, Whalen & Austin for the Appellant.

Egburt E. Woodbury, Attorney General; E. C. Aiken, Jeremiah F. Connor, of counsel, for Respondent.

KELLOGG, *J.*:

The plaintiff was injured while engaged in tamping ties upon the appellant's track, at Lake Katrine, Ulster County, N. Y.,
39 which was used both for State and inter-state commerce. While thus tamping the ties a stone flew up and injured his eye, for which injury this claim is made. We may assume that if he had been injured by the defendant's negligence he could maintain an action therefor under the Federal Employers' Liability Law. It is urged that he is not entitled to the benefit of the Workmen's Compensation Law as he was injured while engaged in inter-state commerce, but can seek only such remedies as the Federal Employers' Liability Act gives him.

The Federal Employers' Liability Act is entitled "An act relating to the liability of common carriers by railroads to their employees in certain cases." The title clearly indicates that it does not cover all the grounds of liability but that the Act relates only to the particular cases expressly provided for in it. The provisions of the Act relate solely to liability on account of negligence. The several states, therefore, in the exercise of their police power, may make such laws and regulations for the protection of the laborers within the State as may seem best, unhampered by the Federal Employers' Liability Act, except so fas as they attempt to prescribe a liability for negligence or the remedies therefor in interstate commerce.

The Workmen's Compensation Law has no reference to the question of the negligence of the employer and creates no liability or remedy for negligence.

By Section 19 of Article 1 of the Constitution, the legislature has the power to enact laws "for the protection of the lives, health, or

safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting
40 from such injuries without regard to fault as a cause thereof" except in certain cases.

The Workmen's Compensation Law was enacted under that provision and the legislature evidently intended to take care of the workmen through a State system of insurance. The State insurance fund makes the compensation to the injured employee. By insuring in the State fund the employer is under no liability to pay and does not pay anything to his employee. The premium of insurance represents the only expense to him imposed by the law and the constitution provides that the moneys paid by him under the Act shall be held to be a proper charge in the cost of operating the business.

While the moneys are paid to the injured employee by the State, nevertheless they have been collected from the various hazardous employments upon the basis of the number of men employed, the payroll and the supposed risks of each employment. If the appellant had insured in the State fund, the fund would have received on account of this injured employee moneys by way of premiums which are based upon his service upon the track and upon the theory that he is insured while so at work. The employer has been guaranteed by the Act protection from any liability on account of accidents occurring in its business and the employee has been promised protection from such accidents. The State fund, therefore, would not be in a good position to contend that the moneys so received were not applicable to compensate for an injury received in an employment which it has assessed and insured. The moneys in its hands for the benefit of injured employees would in part be paid for carrying this very risk.

It is true that the statute permits the compensation commission to accept the employer as a self insurer, if he satisfies it of his
41 ability to respond or furnishes to it proper security, but when he becomes a self insurer, he in effect, takes the place of the State fund as an insurer and his liability therefor under the Act is not strictly as an employer but as a self insurer. He has taken the place which the statute primarily intended the State fund to take and necessarily assumes corresponding liabilities. He may choose not to be a self insurer and not to insure in the State fund and to obtain insurance in a company or association authorized to make such insurance but the company or association is simply taking the place of the State fund. The self insurer, the company or the association pays the losses to the fund. The fund, in all cases, through the commission, makes the compensation to the employee.

The statute should be given a broad and liberal construction in order to carry out the beneficent purposes for which it was enacted. It is not a law fixing a liability for negligence or fixing a liability upon or creating a cause of action against the employer but, as we have said, is in substance a provision that the State will make compensation to injured employees in hazardous business from moneys

which it has collected or secured from them. It is a State system of insurance.

No liability other than for premiums is imposed upon the employer except by way of penalty. He may relieve himself from the payment of premiums by becoming a self-insurer.

The State may regulate business and it is its duty to regulate businesses of such a hazardous nature that the employees are exposed to great dangers from risks incident to them. The people, in adopting the constitutional provision, and the legislature, in enacting this statute, recognize the fact that these hazardous employments as a whole must contribute to the compensation for the injuries they or-
42 dinarily inflict upon the employees engaged in them. I think the real intent and purpose of the Act is plain when it is treated purely as a requirement of insurance in the State fund and that the provision for a self insurer and other insurance carriers are make-shifts adopted for the convenience of the employer but which should not in any way infringe upon the integrity or the real spirit of the Act. The legislative intent primarily is not to require any employer to make satisfaction to his employee for an injury sustained but to make all the hazardous businesses contribute to a fund which shall compensate for any injury received in any one of such employments. The fact that the employer takes advantage of certain provisions in the Act and becomes a self insurer does not affect the construction of the Act nor work to the prejudice of the employees engaged in that particular employment. The Act was intended to benefit equally all employees engaged in such employments. There was no intent to allow the employer by his act to change the purposes of the law or to affect the benefits which his employees were entitled to under it and which other employees receive. An employee is not prejudiced by the fact that his employer qualifies as a self insurer or insures otherwise than in the State fund. The rights of the employee under the Act do not depend at all upon the manner in which his employer has elected to carry his insurance.

The Federal statute giving a remedy in certain cases of negligence does not interfere with the rights of the State to require that every employee in a hazardous business shall be insured.

It is urged that the claimant may claim under the Federal and the State statutes, thus securing a double compensation. That question must be met when it arises. If he resorts to the Compensation Law and receives compensation thereunder, probably, within the
43 spirit of section 53 of that law, he has no remedy against the employer. If he receives compensation under either law, it may well be held that he has received pay for the injury which he has sustained upon a remedy chosen by him and that his election of one of such remedies prevents him from resorting to the other. It is urged, however, that the employer in an inter-state business may be put in an anomalous position by being required to show his own negligence in order to defeat the claim of the employee under the compensation law. If it is held that the compensation law does not apply to cases where the injury was caused by the negligence of the employer. If a claim is made against the employer under the com-

pensation law and he claims that law has no effect because the employee was injured in interstate commerce by the negligence of the employer, it will then be for the court to determine whether the employer can urge his own negligence to defeat the employee's claim for compensation. If he were not negligent, compensation must be made. Can he claim exemption by proving his own wrong? These questions present no serious objection to the interpretation we contend for. We are not unmindful of the fact that some recent amendment to the compensation law, since the injury in question, permits settlement in some cases by the self insurer with the approval of the commission. It is not for us to consider the wisdom or unwisdom of such amendment. It does not bear upon this case and does not affect the broad principle that the original statute contemplated that the State was to settle for the injury from moneys which it had collected or caused to be secured to it, not from a particular employer but from all hazardous employments.

This resident of the State working as a common laborer at the place of his residence upon a railroad track, who perhaps never was
44 in or upon a railroad car, should not be deprived of the benefits of this remedial statute enacted for his benefit, simply because at times interstate trains passed over the road upon which he was working. The statute should not be killed by refinements or construed to death but, within the spirit of section 21 of the Act, should be applied to every case arising in such hazardous employments where a Federal statute does not necessarily conflict with it.

Congress has not established any general rule of liability or method of compensation between employers and employees. It has by the Federal Employers' Liability Act only regulated the method of enforcing liability in cases of negligence and that statute is not the action of Congress referred to in section 114 of the Compensation Law. If Congress makes a general regulation as to liability or compensation for accident occurring from the business without regard to fault as a cause thereof as distinguished from actions of negligence, then section 114 must be considered. I favor an affirmance.

45 *Dissenting Opinion, per Smith, P. J.*

SMITH, *P. J.*, dissenting:

In this case the claimant was injured while engaged in tamping ties upon the appellant's track, which was used both for State and Interstate Commerce. While thus tamping the ties a stone flew up and injured his eye, for which injury this claim is made. It is assumed by all counsel that the claimant was injured while engaged in Interstate Commerce, and had this injury resulted from defendant's negligence the claimant would have a right of action under the Federal Employers' Liability Act. The claim was allowed by the Compensation Commission with one dissenting vote, upon the ground apparently that inasmuch as the accident was not claimed to have been caused by any negligence on the part of the defendant the act of Congress had not assumed to regulate the lia-

bility of the defendant, and for such reason the Compensation Law of the State was applicable thereto.

By Section 114 of the Compensation Act it is provided that the provisions of this chapter shall apply to a workman engaged both in Intrastate and Interstate Commerce "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with Intrastate work may and shall be clearly separable and distinguishable from Interstate or Foreign Commerce." Congress has assumed to legislate upon the liability of masters to their servants where the masters are engaged in Interstate Commerce. (35 Stat. 85, c. 149, Laws of 1908, as amended by 36 Stat. 291, Chap. 143 in 1910.) These acts provide for a liability in excess of common law liability. Upon the principle of expressio unius exclusio alterius the acts constitute a denial of liability except in the cases mentioned. In any event a rule of liability is estab-
46 lished by Congress directly within the terms of Section 114, and the work in which the claimant was engaged was not severable from Interstate Commerce. Section 114 seems to contemplate cases where Congress had legislated either as to a rule of liability, or as to a method of compensation. It seems to have been within the mind of the Legislature that Congress might hereafter pass a Workmen's Compensation Act. Having limited, however, the effect of this Compensation Act to cases in which either a method of compensation or a rule of liability had been established, the intent would seem clear to exclude all cases where the party was engaged in work not severable from Interstate Commerce, as long as the rule of liability of master to servant, where the work was performed in connection with Interstate Commerce had already been prescribed by Congress.

It has been held in Illinois, which apparently did not have this provision in its Compensation Act that where the accident happened without negligence of the employer there was no conflict between the State and Federal jurisdiction, that the Federal Act attempted to regulate Interstate Commerce, while the State Act was merely a method of compensation operative only after the act was accomplished. (Staley v. Illinois Central Railroad Company, 111 App. Court Reports, Vol. 186, page 593.) If this be sound law, of which I have grave doubts, nevertheless, the limitation contained in Section 114 of our Compensation Act to my mind creates a different rule.

Nor can it be claimed that the rule of liability established by the Federal Act is simply a rule of liability in case of negligence, so that as far as a State Compensation Act authorizes recovery for injuries without negligence, it does not conflict with the liability law. This cannot be held in the first place as heretofore
47 indicated, because of the limitation in the act itself where either a rule of liability is created or a method of compensation by the Federal Government. But also to my mind the distinction is impracticable. A party injured could then claim compensation whether his injury was the result of the negligence of the em-

ployer or without negligence, and it would be unreasonable to compel the employer to prove his own negligence to show that the case was one within which the rule of liability was established by the Federal Law. The result would be in most cases to give to the injured party an option to claim under the Compensation Act, or under the Federal Liability Law. Apparently to prevent just this situation, as well as to avoid antagonism in the field already occupied by the Federal Statute, Section 114 was inserted into this act denying relief to one engaged in Interstate Commerce, in case either a Federal Liability Law existed or a Federal Compensation Act.

As far as the constitutionality of the Compensation Law is challenged, at the March term a decision was handed down by this Court affirming its constitutionality, so that the question is not now open for our consideration. We are of the opinion that the appellant by filing a bond has not waived any objection to the unconstitutionality of the act, because in the first place the penalties for not filing a bond, if one be required, are so great as to make the filing of the same necessary for the protection of the appellant, and in the second place, within Section 114 of the Compensation Law the defendant is clearly liable under the Act where the duties of an employee are clearly separable from Interstate Commerce. For the reason stated the determination should be reversed.

Award affirmed. Opinion by Kellogg, J. All concur, except Smith, P. J., dissenting in opinion in which Howard J., concurs.

48 *Appellate Division Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, Held at the Appellate Division Court Rooms, in the City of Albany, N. Y., Commencing on the 4th Day of May, 1915.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.
Hon. John M. Kellogg,
Hon. George F. Lyon,
Hon. Wesley O. Howard,
Hon. John Woodward,
Associate Justices.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer and Self-insurer, Appellant.

The above named The New York Central and Hudson River Railroad Company having appealed from the award of the Workmen's Compensation Commission entered in the office of said Commission on the 17th day of November, 1914, whereby compensation was awarded to the above named James Winfield at the rate of

$6.54 weekly for the period of two weeks; and said appeal having come on to be heard in this court, and having been argued by William L. Visscher, Esq., of counsel for the appellant and E. C.
49 Aiken, Deputy Attorney General, for the Workmen's Compensation Commission, and due deliberation having been had thereon;

Now, on motion of Egburt E. Woodbury, Attorney General, and attorney for the Workmen's Compensation Commission, it is

Ordered, that the award of the Workmen's Compensation Commission appealed from be and the same hereby is in all respects affirmed.

[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

A copy:

JOSEPH H. HOLLANDS, *Clerk.*

50 *Commissioner's Order of Affirmance.*

Before the State Workmen's Compensation Commission.

In the Matter of the Claim of JAMES WINFIELD for Compensation under the Workmen's Compensation Law

against

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Slef Insurer, Appellants.

Whereas, the New York Central and Hudson River Railroad Company having appealed to the Appellate Division of the Supreme Court, Third Department, from the award and decision of the Workmen's Compensation Commission made October 23, 1914, allowing compensation to the above named James Winfield for a period of two weeks at the rate of $6.54 per week; and said appeal having been heard by said Appellate Division of the Supreme Court, and the said Appellate Division of the Supreme Court having duly affirmed the award and decision of the Workmen's Compensation Commission at a term of said court commencing May 4, 1915, by an order duly filed with the Clerk of said Appellate Division, and the papers on appeal herein together with a certified copy of said order of the Appellate Division, having been remitted to the Workmen's Compensation Commission and having been duly filed.

Ordered, that the order of the Appellate Division be and
51 the same hereby is made the order of the State Workmen's Compensation Commission, and further ordered that the award of compensation made herein October 23, 1914, be and the same hereby is affirmed.

Dated, May 14, 1915.

CHARLES D. O'CONNELL,
Ass't Secretary.

52 *Employer's Notice of Appeal to the Court of Appeals.*

State Workmen's Compensation Commission.

Claim No. 21925.

In the Matter of JAMES WINFIELD, Employee,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer.

To The Attorney General of the State of New York;
The State Workmen's Compensation Commission;
Hon. Jeremiah F. Connor, counsel to said commission;
James Winfield, employee;
Messrs. Brinnier & Canfield, attorneys for said employee.

SIRS: Take notice that the above named employer, The New York Central and Hudson River Railroad Company, hereby appeals to the Court of Appeals of the State of New York from the order of the State Workmen's Compensation Commission, bearing date May 14th, 1915, made and entered upon an order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, bearing date May 4th, 1915, and entered in the office of the clerk of said Appellate Division on the 10th day of May, 1915, affirming the decision and award of the State Workmen's
53 Compensation Commission, which bears date November 17th, 1914, which order of the Appellate Division will also be brought up for review upon said appeal.

Dated, May 20th, 1915.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for N. Y. C. & H. R. R. R. Co.

Office and Postoffice Address, 19 Tweddle Building, Albany, N. Y.

54 *Stipulation Waiving Certification.*

In the Court of Appeals of the State of New York.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

Stipulated, pursuant to the provisions of section 3301 of the Code of Civil Procedure, that the preceding printed copies of notice of appeal, decision and award of the State Workmen's Compensation Commission, and papers and records on file in the office of said Commission, which constitute all of the papers used, records filed

and proceedings, including the evidence taken before said Commission in the above entitled proceeding, and upon which said Commission acted in rendering said decision and award, opinions in the Appellate Division, Appellate Division order of affirmance, order of affirmance made by Commission, and notice of appeal to the Court of Appeals, are true and correct copies of the whole of the respective originals thereof now on file in the office of said Commission, and that certification thereof is hereby waived.

Dated, May 24th, 1915.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
BRINNIER & CANFIELD,
Attorneys for Respondent.
EGBURT E. WOODBURY,
Attorney General.
JEREMIAH F. CONNOR,
Counsel to Compensation Commission.

55 In the Court of Appeals, State of New York.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Employer, Appellant.

Supplemental Papers on Appeal.

Visscher, Whalen & Austin, Attorneys for Employer-Appellant. Office and Post Office Address, 19 Tweddle Building, Albany, N. Y.

Brinnier & Canfield, Attorneys for Respondent, 53 John Street, Kingston, N. Y.

Hon. Egburt E. Woodbury, Attorney General. Office and Post Office Address, The Capitol, Albany, N. Y.

Hon. Jeremiah F. Connor, Counsel for State Industrial Commission, 1 Madison Avenue, New York City.

56 In the Court of Appeals, State of New York.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer, Appellant.

New York State Workmen's Compensation Commission,
1 Madison Avenue, New York, N. Y.

Employer's Application to Carry His Own Risk by Furnishing Satisfactory Proof, etc.

The undersigned (hereinafter referred to as the applicant) hereby makes the following declarations for the purpose of enabling the

State Workmen's Compensation Commission of New York to make a finding of facts, either holding that the applicant is not bound by the compensation law or that it possesses sufficient financial ability to render certain the payment of compensation to its injured employes or to dependents of employes who die in consequence of accident.

Applicant hereby makes a statement of facts as follows:

1. Name of applicant: New York Central & Hudson River Railroad Company.

57 Nature of business: Transportation of persons and property by railroad in foreign, interstate and intrastate commerce.

Address: Grand Central Terminal, New York, N. Y.

2. Applicant's assets are of the value of: $698,594,763.93.

Capital stock: 225,576,166.00.

Applicant's liabilities less capital stock: 473,018,597.93. (A detailed statement of applicant's assets and liabilities is filed herewith.)

3. Description of employment, etc. Location of plant or plants: Maintenance and operation of railroad. Throughout the States of New York, Massachusetts, New Jersey, Pennsylvania and the Province of Quebec.

(N. Y. C. & H. R. R. R. Co.) (Application for ruling of exclusion or permission to self-insurer.)

Kinds of employment. Last 6 mos. 1913.

Men wage expenditure. Last 6 mos. 1914 (Est.).

Men wage expenditure.

(Here follow upwards of fifty items under above headings, with the totals shown below.)

Total: 56,382, $23,541,013.64, 48,872, $20,797,595.31.

(N. Y. C. & H. R. R. R. Co. application for ruling of exclusion or permission to self-insure.)

58 The above statement covers approximately the entire payroll of the applicant in the State of New York, including officers and employes not engaged in hazardous employments, and also those who are not engaged in the construction, maintenance and operation of the railroad. Where the compensation averages in excess of $1,500. per annum the excess has been omitted. It is the opinion of the applicant that under Section 114 of the New York Compensation Law none of its employes are within the law.

4. (*a*) Do you maintain a hospital or hospitals in connection with your works or plant?

Yes.

(*b*) If your answer be "yes" give a description of such hospital or hospitals.

We have contracts with many hospitals on the road and in addition maintain emergency hospitals at several of our larger places.

(*c*) Are you a member of an association for accident prevention?

No, we maintain our own organization.

(*d*) What is the plan of such organization?

We maintain a separate bureau and organization consisting of a

General Safety Agent with assistants and of numerous committees in shops and on the various divisions.

(*e*) Do you have in your employ one or more individuals whose regular duty is to make daily inspection of your plant or
59 works for the purpose of securing compliance with statutes or general orders of the Commissioner of Labor relative to safety and sanitation?

Aside from the necessary inspection in shops, the safety organization has gone beyond the requirements of the state inspectors in perfecting and applying safeguards.

(*f*) If your answer be "yes" give the names and addresses of such person or persons.

Mr. Marcus A. Dow, General Safety Agent, Grand Central Terminal, New York, N. Y.

5. Applicant asks that a finding of fact be made by the Commission on one of the following propositions:

First. The applicant invites the New York Workmen's Compensation Commission to consider the character of the service rendered by it and its employes and to rule, in view of Section 114, that as a carrier by railroad "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States," it does not come within the purview of the compensation act and that no action is necessary on the part of the applicant under Section 50 of the act providing for a method of assuring compensation.

Second. If the Commission finally concludes that the act does in fact apply to any of the employes of the applicant, then, in view of its financial condition and the evident limited application of the act to applicant, it requests the State Workmen's Compensation Commission to authorize self-insurance without the deposit of securities under Sub-division 3 of Section 50 of the act during the last half of the current year, or until definite determination is made of the questions involved.

60 (N. Y. C. & H. R. R. R. Co. application for ruling of exclusion or permission to self-insure.)

The applicant does not care to avail itself of the permission to make a contract, in accordance with Section 114, with its employes to become bound by the act.

If the Commission desires, applicant is prepared to furnish it with additional facts or evidence supporting the above allegations.

Dated at New York, N. Y., this 23rd day of June, 1914.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

(Sgd.) By FRANK V. WHITING,
General Claims Attorney, Grand Central Terminal, New York, N. Y.

Attest:
[SEAL.] (Sgd.) D. W. PARDEE, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of July, 1914, before me, a Notary Public, in and for said county, appeared personally Frank V. Whiting, General Claims Attorney of the New York Central & Hudson River Railroad Company, who, being first duly sworn, declared that the facts set forth in the foregoing application are true.

—— ——, *Notary.*

(My commission expires —— —, ——.)

61 New York Central Lines.

June 23, 1914.

New York State Workmen's Compensation Commission, 1 Madison Avenue, New York, N. Y.

GENTLEMEN: The New York Central & Hudson River Railroad Company respectfully submits herewith an application to the New York State Workmen's Compensation Commission for a ruling that it does not come within the scope of the Workmen's Compensation Law, or, for authority to carry its own risk thereunder.

The application is submitted in alternative form for convenience and to expedite the disposition of the same.

The applicant has asked for a general ruling that its employes are not within the law, and in this connection the Commission is also asked to consider the character of the service rendered by the applicant and its employes under Section 114, the carrier being a railroad "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States" the applicant believing that its employes do not come within the law.

In this connection attention is called to the following decisions of the United States Supreme Court dealing with the application of the Federal Employers' Liability Act to employes of interstate carriers, and also to a ruling of the Ohio State Liability Board of Awards in considering a similar section of the Ohio law, to wit: Section 51, dealing with interstate commerce, that board holding that the law is not applicable to interstate carriers or their employes:

62 Pedersen vs. D. L. & W. R. R. Co., 229 U. S. 146;
St. L. S. F. & Tex. Ry. vs. Seale, 229 U. S. 156;
G. C. & S. F. Ry. Co. vs. McGinnis, 228 U. S. 173;
Seaboard Air Line vs. Horton, U. S. Advance Opinions No. 13, page 635;
Illinois Central R. R. Co. vs. Behrens, 193 Fed. 581, reversed by U. S. Supreme Court, U. S. Advance Opinions, No. 13, page 646;

Carr vs. N. Y. C. & H. R. R. Co., 77 N. Y. Misc. 346, this case being unanimously affirmed by the Appellate Division, in 157 A. D. 941, to which special attention is called.

In the Carr case the Appellate Division held that notwithstanding the fact that Carr was at the time of injury engaged in an act that

momentarily related to the movement of two cars of intrastate freight, his connection with interstate service was continuing, and that he was entitled to recover under the Federal Employers' Liability Act, for the reason that the carrier and the employe were engaged in interstate commerce at the time of the accident.

It seems clear to the applicant that to the extent that the intrastate character of the service rendered by the carrier and employes is not clearly separable and distinguishable from the interstate character of the service rendered by both, the compensation law does not apply, and it is obvious that in determining whether or not an employe or his dependents are entitled to compensation, the determination must be based upon the accustomed service of the employer as well as the employe.

63 Even though it should be claimed that the compensation act would apply to employes injured when actually engaged in an act of intrastate transportation, it is obviously impossible to say antecedent to performance of service in what proportion the time of an employe will be given to such act severable from his service in the movement exclusively interstate transportation, let alone the time engaged in handling transportation both state and interstate, during which time it is clear that he is engaged in interstate commerce within the decisions of the United States Supreme Court, and for this reason the applicant submits its payroll statement covering aggregate service within the State of New York.

The payroll further contains salaries of officers and clerical forces not engaged in the construction, operation or maintenance of the railroad.

The applicant contends that as to employers engaged in intrastate and interstate and foreign commerce, the act, by virtue of Section 114, is in fact a voluntary and not a compulsory law.

Yours very truly,

(Signed) FRANK V. WHITING,
General Claims Attorney.

New York Central Lines.

June 26, 1914.

New York State Workmen's Compensation Commission, 1 Madison Avenue, New York, N. Y.

GENTLEMEN: In accordance with the suggestion of Mr. Wainwright this morning, I have ascertained that our payroll for

64 the six months ending December 31st, 1913, covering our passenger conductors, trainmen and motormen, in our suburban service in New York aggregated $174,834.17 and a reasonable estimate for the last half of 1914 is that it will not exceed this amount.

I wish to state that we consider it impossible to separate our payroll to determine in advance of an accident whether or not an employe will be under the Federal Act, but based on our experience in handling claims heretofore it is our opinion that ninety-eight per cent of the accidents at least are to employes when engaged in interstate commerce.

I would also call attention to the fact that in estimating our premium I think it is improper to charge us a flat rate of $14.85 for all classes of employment. We have thousands of employes who are not connected with the operation of trains, such as carpenters, blacksmiths, machinists, and the like, who, at least if employed by another employer, would be entitled to a lower rate, and I submit that in estimating the premium upon whatever proportion of the payroll you decide to estimate it on, that the various rates for the different operations should prevail.

Yours very truly,

(Signed) FRANK V. WHITING,
(General Claims Attorney.)

65 STATE WORKMEN'S COMPENSATION COMMISSION,
THE CAPITOL, ALBANY, NEW YORK,
June 29, 1914.

Attention of Frank V. Whiting, General Claims A'tty.

The New York Central Lines, Grand Central Terminal, New York, N. Y.

GENTLEMEN: Your application to carry your own risk has been granted on condition that you deposit securities to the amount of $300,000.00 and $30,000.00 in cash, and that you notify this Commission of your intentions to increase your mortgages or funded indebtedness. Your privilege to carry your own risk will be revoked if you fail to notify this Commission of such intended increases in your mortgages or funded indebtedness.

The only securities accepted by the Commission will be United States Bonds, New York State Bonds or New York City Bonds.

The Commission declined to rule that you do not come within the scope of the Workmen's Compensation Law, and also declined to grant you the privilege of carrying your own risk unless securities and cash are deposited with them in accordance with Section 50, Sub-Division 3 of the Workmen's Compensation Law.

Very truly yours,

N. J. ROSENBERG,
Assistant Secretary.

N. J. R./M. B.

66 July 1, 1914.

New York State Workmen's Compensation Commission, 1 Madison Avenue, New York, N. Y.

GENTLEMEN: Referring to the application made by this Company to the Commission, dated June 23rd, 1914, for a finding of facts on part of the Commission, either holding that the applicant is not bound by the compensation law or that it possesses sufficient financial ability to render certain the payment of compensation to its injured employes or to dependents of employes who die in consequence of accident, and further to the Commission's reply under date of June 29th, 1914, together with finding of the Commission that it is satis-

fied with the proof presented in such application tending to establish the financial ability of the undersigned so to pay compensation, and fixing the amount of security which the undersigned is required to deposit under Subdivision 3 of Section 50 in the sum of $300,000 and asking for a cash deposit under Section 25 of $30,000.

The undersigned, without prejudice to its contention that it does not come within the provisions of the Workmen's Compensation Law, and reserving all contentions as to the invalidity of said act or any part thereof, hereby tenders to the Commission $300,000 in securities prescribed by Section 13 of the insurance law of the State of New York, and also cash in the form of a certified check for $30,000 in compliance with such finding.

The undersigned declines to comply with the other conditions specified by the Commission in its "Form of Decision" on said application, or to enter into the "Agreement and Undertaking" on
67 the ground that the Commission is without legal authority to impose the same. The said securities are hereby tendered with the understanding on the part of the undersigned that the same are to be held and disposed of by the Commission strictly in accordance with the provisions and for the purposes provided in the Workmen's Compensation Act, and not otherwise, and that the interest payable upon said securities, so long as they are held by the Commission, will be turned over to and belong to the undersigned, unless required to be used for some purpose provided by the Act.

The sum of $30,000 deposited with the Commission, pursuant to Section 25 of the compensation act, shall be used only for the purposes set forth and in the manner provided in said section, the interest received by the Commission on this deposit to be credited to the account of the undersigned.

The undersigned will comply with all rules and requirements that may be lawfully made and promulgated by the Commission.

Respectfully yours,

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

(Sgd.) By A. H. SMITH, *President.*

68 STATE WORKMEN'S COMPENSATION COMMISSION,
THE CAPITOL, ALBANY, NEW YORK,
July 21, 1914.

Attention of Frank V. Whiting, General Claims Att'y.

New York Central & Hudson River R. R. Co., Grand Central Terminal, New York, N. Y.

GENTLEMEN: By direction of the Commission, I herewith submit the resolution adopted by the Commission in lieu of the letter forwarded to you on June 29th giving you information as to conditions on which you were granted the privilege to carry your own risk.

Resolved: That the application of the *New* New York Central & Hudson River Railroad Company for self-insurance, under Subdivision 3 of Section 50 of the Act, be granted upon their depositing with the Commission Three Hundred Thousand Dollars ($300,-

000.00) in securities, and Thirty Thousand Dollars ($30,000) in cash for the payment of current claims, upon their executing the agreements relating to deposit of securities and of cash in the modified form approved and reported to the Commission by the Committee on Rules, and that the modified decision of the Commission with respect to the New York Central & Hudson River Railroad Company shall be a substitute for all previous actions.

The securities accepted by the Commission shall be in the stocks or bonds of the United States, or of this State or in the bonds of a county or incorporated city in this State, authorized to be
39 issued by the legislature, not estimated above their par or their current market value.

The deposit required is specified in the enclosed form, which you are requested to sign and acknowledge before the proper officer.

Please return immediately the enclosed forms with the required bonds and cash. Upon their receipt acknowledgment will be given.

Please be advised that this Commission request you to inform them if at any time you contemplate increasing your mortgages or funded indebtedness. Failure to notify this Commission will be followed by a revocation of your privilege.

Yours very truly,

(Sgd.) N. J. ROSENBERG,
Ass't Sec'y.

N. J. R./M. B.

Form of Agreement and Undertaking of Employer Granted the Privilege of Paying Compensation Without Insuring.

We, The New York Central & Hudson River Railroad Company, an employer, engaged in the business of transportation by railroad, with headquarters situated at New York, N. Y., having applied to the State Workmen's Compensation Commission under subdivision 3 of Section 50 of the Workmen's Compensation Act for the privilege of paying compensation without insuring, which application has been granted.

70 Do hereby undertake and agree as a condition precedent to such grant taking effect, without prejudice to our contention that we do not come within the provisions of the Workmen's Compensation Act, and reserving all contentions as to the invalidity of said Act or any part thereof:

1. That we will, and hereby do, make a deposit with the Commission, under Subdivision 3 of Section 50 of the Act, to secure our liability to pay the compensation provided in the Act, of the following securities, duly assigned to the Commission,

Date of issue.	Due date.	Interest dates.	Numbers.	Bonds of—	Par value.
April 16, 1914	March 1, 1964	....			
"	"	....	82	City of N. Y.	$100,000
"	"	....	110		100,000
		....	111		100,000

such securities being of the aggregate par value of Three Hundred Thousand ($300,000) dollars, and the aggregate market value being in excess of par value.

Such securities are deposited with the Commission with power to hold and dispose of the same strictly in accordance with the provisions and for the purposes provided in the Workmen's Compensation Act, and not otherwise. The interest collected by the Commission upon securities deposited by us under subdivision 3 of Section 50, so long as they are held by the Commission, will be turned over to and belong to the undersigned unless required to be used for some purpose provided by the Act.

2. That we will, and hereby do, make a deposit of Thirty Thousand ($30,000) dollars in cash with the Commission under Section 25 of the Act, to secure the prompt and convenient payment
71 of all compensation for which we may become liable, with full power and authority to the Commission to apply the same or whatever portion thereof may be lawfully required, upon not less than three days' written notice to us, to the payment of all compensation for which we become liable under the award or awards of the Commission, and we do hereby further agree and bind ourselves to make good our said cash deposit immediately.

3. That we, whenever required by the Commission so to do, will upon five days' written notice from the Commission, pay an amount equal to the present value of the future payments of compensation under any award made by the Commission against us, into the State Insurance Fund, to be held by it and disposed of in accordance with the terms of Section 27 of said Act or any other provision of said act.

4. That if at any time the Commission shall in its discretion require additional proof of our continuing ability to pay compensation without insuring the same, or a larger deposit of securities or of cash than is herewith tendered, we agree, within ten days after the mailing of notice to us at our last given post office Address, to supply proof satisfactory to the Commission or to make and maintain such larger deposit, failing which proof or deposit this privilege to pay compensation without insuring we consent *that* be revoked.

The foregoing deposits and promises are hereby tendered to the Commission as fulfillment on our part of the conditions precedent, named in their grant to us of the privilege of paying compensation.

Signed at New York, N. Y., this 21st day of July, 1914.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

(Sgd.) A. H. SMITH.

Witness:

(Sgd.) W. J. ALGER.

72 *Employer's Form for Agreement to Make and Maintain a Cash Deposit under Section 25 of the Workmen's Compensation Act.*

We, the New York Central & Hudson River Railroad Company, an employer engaged in the business of transportation by railroad, with headquarters at New York, N. Y., to whom Privilege No. 157 to carry our own risk has been granted, herewith make, and hereby promise to maintain while such Privilege remains in force and until all obligations incurred by us during such period under the Workmen's Compensation Act of New York shall have been discharged, a cash deposit with the State Workmen's Compensation Commission of the Amount of Thirty Thousand Dollars ($30,000.00) to secure the prompt and convenient payment of compensation awarded by such Commission to be paid by us; and, to enable the purpose for which this deposit is made, to be fully and effectively carried out, we hereby authorize the State Workmen's Compensation Commission to pay out of such deposit any and every sum which such Commission may find due and payable by us under any award, reserving the right of contest or appeal provided by the terms of the Workmen's Compensation Act. The exercise of this discretion shall not render the Commission or any Commissioner or other employee of the Commission liable for any moneys so paid out, unless otherwise provided by the law of this State.

The interest received by the Commission on such deposit is to be credited to the account of the undersigned.

We further promise and agree to maintain such deposit,
73 by replacing all amounts so paid out immediately upon receipt of written notice.

Signed at New York, N. Y., this 21st day of July, 1914.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

(Sgd.) By A. H. SMITH.

Witness:

(Sgd.) W. J. ALGER.

74 In the Court of Appeals of the State of New York.

In the Matter of JAMES WINFIELD, Employe, Respondent,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Appellant.

It is hereby stipulated that the foregoing supplemental papers on appeal may be annexed to, and made a part of the return in this proceeding heretofore filed on June 1st, 1915, in this Court.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
BRINNIER & CANFIELD,
Attorneys for Respondent.
E. E. WOODBURY,
Attorney General of the State of New York.
JEREMIAH F. CONNOR,
Attorney for State Industrial Commission.

75 *Stipulation.*

Pursuant to the provisions of Section 3301 of the Code of Civil Procedure, it is hereby

Stipulated and agreed by and between the Attorney General of the State of New York, the counsel for the State Industrial Commission, and the attorneys for the employer and employee, being all of the attorneys who have appeared in the foregoing proceeding brought to have determined a claim under the State Workmen's Compensation Law, that the preceding printed copies constitute and include all of the correspondence between the State Workmen's Compensation Commission and the employer requesting leave to be relieved from the operations of the Compensation Act, and further making application to become a self insurrer, and are true copies of each of, and the whole of, the respective originals thereof, now on file and of record in the office of the State Industrial Commission; and it is further

Stipulated, that the said papers and the record thereof need not be certified, certification hereby being waived.

Dated, June 25, 1915.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
BRINNIER & CANFIELD,
Attorneys for Respondent.
EGBURT E. WOODBURY,
Attorney General of the State of New York.
JEREMIAH F. CONNOR,
Attorney for State Industrial Commission.

76 10-8-15-250 (39-10388). Form 6.

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 23rd day of November, in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

Witness, the Hon. Willard Bartlett, Chief Judge, presiding. R. M. Barber, Clerk.

Remittitur November 24, 1915.

In the Matter of the Claim of JAMES WINFIELD
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD Co.

Be it remembered, that on the first day of June, in the year of our Lord one thousand nine hundred and fifteen, The New York

Central and Hudson River Railroad Co., the appellant in this proceeding, came here into the Court of Appeals, by Visscher, Whalen & Austin, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, which return was thereafter amended.

77 And James Winfield the respondent in said proceeding afterwards appeared in said Court of Appeals by Brinnier & Canfield, and Egburt E. Woodbury, Att'y Gen'l, his attorneys.

Which said Notice of Appeal and the return thereto, filed and amended as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert E. Whalen, of counsel for the appellant, and by Mr. Harold J. Hinman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

78 Court of Appeals, Clerk's Office.

ALBANY, Nov. 24, 1915.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[L. S.] R. M. BARBER, *Clerk.*

79 At a term of the Appellate Division of the Supreme Court, held in and for the Third Judicial Department at the Appellate Division Court Rooms, in the City of Albany, N. Y., commencing on the 9th day of November, 1915.

Present:

Hon. John M. Kellogg, Presiding Justice.
Hon. George F. Lyon,
Hon. Wesley O. Howard,
Hon. John Woodward,
Hon. A. V. S. Cochrane,
Associate Justices.

In the Matter of the Claim of JAMES WINFIELD, Employee-Respondent, for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Employer and Self-insurer, Appellant.

The above named, New York Central & Hudson River Railroad Company having appealed from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department made at a term commencing on the 4th day of May, 1915, which affirmed the award of the Workmen's Compensation Commission, entered in the office of the said Commission on the 17th day of November, 1914, whereby compensation was awarded to the above named James Winfield at the rate of six dollars and fifty-four cents weekly for a period of two weeks; and said appeal having been argued in the Court of Appeals by Robert E. Whalen, Esq., counsel for the appellant, and by Harold J. Hinman, Esq., of counsel for the respondent, and after due deliberation had thereon, the Court of Appeals having ordered and adjudged that the order of the
80 Appellate Division of the Supreme Court appealed from be affirmed with costs, and it having been further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court for the Third Judicial Department, there to be proceeded upon according to law, and said remittitur having been filed in this court,

Now, on motion of Egburt E. Woodbury, Attorney-General and attorney for the State Industrial Commission, formerly the Workmen's Compensation Commission, it is

Ordered that the order and judgment of the Court of Appeals be and the same is hereby made the order of this court, and that the award or decision of the Workmen's Compensation Commission entered on the 17th day of November, 1914, be and the same is hereby in all respects affirmed, with $103.65 costs, to be paid by the Appellant.

JOSEPH H. HOLLANDS, *Clerk.*

A Copy.
[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

81 [Endorsed:] Supreme Court, App. Div., Third Dept. In the Matter of the Claim of James Winfield for compensation, &c., against The N. Y. C. & H. R. R. R. Co., Appellant. Copy. Order making judgment of Court of Appeals the Judgment of this court. Egburt E. Woodbury, Attorney-General, Attorney for Respt., Capitol, Albany, N. Y.

82 Court of Appeals.

No. 444.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

S. HO. CHA. CHJ. HIS. CD. CAR.

Appeal by Employer from an Order of the Appellate Division of the Third Department Affirming a Determination of the Workmen's Compensation Commission in Making an Award to the Claimant.

Visscher, Whalen & Austin for Appellant.
Brinnier & Canfield for Respondent.
Hon. Egburt E. Woodbury, Attorney General.
Harold J. Hinman of Counsel.
Hon. Jeremiah F. Connor, Counsel to Compensation Commission.

SEABURY, *J*:

The claimant was employed in connection with the general repair and maintenance of the tracks of the Employer, the New York Central and Hudson River Railroad Company. While tamping ties he was struck in the right eye by a stone which came up from the ground. The Workmen's Compensation Commission awarded him compensation at the rate of $6.54 weekly for two weeks. The claimant's employer at the time of the accident was engaged in interstate commerce. The appellant contends that because the claimant when injured was employed by a railroad company, which was then engaged in interstate commerce, the Federal Employers' Liability Act alone measures the claimant's right to recover and as there can be no recovery under that act, because the injury to the claimant was not the result of negligence, the claimant
83 is remediless. This appeal makes it necessary for us to determine whether this contention is correct. The question presented has not as yet been determined by any decision of the Supreme Court of the United States or of this court. In the absence of controlling precedent, we must endeavor to reach a conclusion which shall be in accord with the established principles which underlie our dual system of government. The Federal Constitution in express terms grants to Congress jurisdiction over interstate com-

merce. The exercise by Congress of a power granted to it by express terms supersedes all legislation on the same subject by the states. In the exercise of the power so conferred, Congress has prescribed the liability of carriers, for injuries resulting from negligence, to their employees while engaged in interstate commerce. (35 U. S. Stat. 65.) The Federal Employer's Liability Act is therefore in so far as it attempts to prescribe the rules of liability for injuries resulting from negligence, paramount and exclusive and must so continue until Congress shall see fit to remit the subject to the reserved police powers of the State. These general principles have been so often enunciated by the Supreme Court of the United States that they are now, no longer open to dispute. Second Employers' Liability Cases, 223 U. S. 1; Adams Express Co. v. Croninger, 226 U. S. 491; Northern Pacific Ry. v. Washington, 222 U. S. 370; Erie R. R. Co. v. New York, 233 U. S. 671; Morgan's S. S. Co. v. Louisiana, 118 U. S. 455, 464; Hennington v. Georgia, 163 U. S. 299; Rasmussen v. Idaho, 181 U. S. 198. Another principle which has been enunciated with the same clearness, is that when the Federal and State governments have jurisdiction to enter the same sphere, the state may legislate upon matters within that sphere until such time as congress shall prescribe regulations upon the same subject. Sinnot et al. v. Davenport et al., 22 How. 227,
243; Ex parte McNeil, 80 U. S. 236; Smith v. Alabama,
84 124 U. S. 465; Gulf, Colorado and Santa Fe Ry. Co. v. Hefley,
158 U. S. 98; Mo. Kans. & Tex. Ry. Co. v. Haber, 169 U. S. 613; Olsen v. Smith, 195 U. S. 332; Reid v. Colorado, 187 U. S. 137. In the light of these principles let us examine the Federal Employers' Liability Act and the Workmen's Compensation Law of this state and endeavor to ascertain whether they assume to deal with the same subject-matter. If upon examination it is found that they do, then in so far as employers and employees are engaged in interstate commerce, the provisions of the Federal Statute must be regarded as paramount and exclusively operative. If upon examination it is found that these two statutes do not cover the same subject-matter we will be in a position to distinguish the different spheres within which each may be given effect. A recognition of the principles upon which the Federal and State statutes are founded will demonstrate that they are not in pari materia. The Federal Employers' Liability Act prescribes the rules under which certain employers are liable to their employees for injuries which result to the latter from negligence. The Workmen's Compensation Law is radically different in principle, purpose, scope and method from The Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents. Under its provisions compensation paid to the employee under the state statute is the result of injury arising in the course of employment and is paid regardless of fault or contract. The principle underlying the state statute is that as injuries to workmen are necessarily incident to the operation of certain hazardous occupations, the expense of compensating the employees for such injuries is properly chargeable upon the

occupation. The purpose of this act was to establish
85 an insurance fund to which employers are required to contribute, out of which fund compensation to the workmen is paid and contribution to which by the employer relieves him of further liability. The scope of the act is much broader than the Federal Employers' Liability Act, because under its provisions the employee is awarded compensation for all accidental injuries arising in the course of his employment whether they result from negligence or not, which are not self-inflicted or sustained as the result of intoxication. The method by which compensation is given to the employee is different from the method by which redress may be secured in an action brought under the provisions of the Federal Employers' Liability Act. Under the state statute the injured employee presents his claim to an administrative board or commission. Notice is given to the parties interested. The proceedings are informal. The compensation awarded the employee is not such as is recoverable under the rules of damages applicable in actions founded upon negligence. It is based on loss of earning power and compensation for medical, surgical or other attendance or treatment or funeral expenses. Perhaps, without inaccuracy it may be said that the primary purpose of the act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made. Having in mind the different principles which underlie the two statutes, the different purpose sought to be accomplished by them, the restricted scope of the Federal statute and the broad scope of the state statute and the different method by which redress is obtained under these statutes, can they reasonably be said to cover the same subject-matter? We are of the opinion that they cannot be so regarded. We think it is evident also that Congress has recognized the difference between these two kinds of statutes. In enacting the Federal Employers' Lia-
86 bility Act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employees is prescribed when the latter were injured as the result of negligence. It did not intend to enter upon the field of compensation for industrial accidents which were not the result of negligence but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that Congress intended to observe the distinction between the two kinds of statutes referred to, is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to Federal Employees in which liability is not made to depend either upon fault or contract, (35 U. S. Stat. 556) whereas as to certain private employments it has regulated the subject only in those cases where the employee is injured as the result of negligence, (35 U. S. Stat. 65). The Workmen's Compensation statute of this state was not in any way designed to conflict with the authority of Congress over interstate commerce. As was said by this court in the Matter of Jensen, (215 N. Y. 514): "Its obvious purpose was to guard against a construction violative of the Constitution of the United States." It is true, of course, that the act is to be

judged not only by its purpose but by what it provides may be done under it. Even considering it in the light of this principle we think that it may lawfully be held to cover such a case as the present without in any way trespassing upon the field of Federal Jurisdiction. As yet, as to private employments, congress has not assumed to make any provision as to compensation for accidents not the result of negligence and Congress not having entered upon this field the state may lawfully do so, until such time as congress shall assume to exercise its power over this subject. The moment congress shall enter upon this field all state regulations upon the subject will be abrogated. The field which congress has pre-empted by the enactment of the Federal Employers' Liability Act is far removed
87 from that of awarding compensation for industrial accidents that are not the result of negligence. Moreover the present Workmen's Compensation Law was deemed a necessary exercise by the state under modern industrial conditions of its police power. (Matter of Jensen, *supra*). The means that have been employed do not go beyond the necessities of the case or impose any unreasonable condition upon interstate commerce. The state has not assumed to supplement the action of congress. It has legislated in a sphere into which as yet, congress has not assumed to enter. When congress shall manifest a purpose to enter this field there can be no division of the field of regulation. When the Federal and State statutes relate to the same subject-matter and prescribe different rules the state statute must yield. When, as in the case under consideration, the Federal and State statutes do not relate to the same subject-matter, the fact that congress, when it so desires, may preempt the field does not render the state statute inoperative until such time as congress assumes to exercise the power. "It is the exercise, and not the existence, of the power that is effectual and exclusive." (Ex parte McNeil, 80 U. S. 236, 240). It was well said by Mr. Justice Harlan in Reid v. Colorado (187 U. S. 137, 148): "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police power of the states, even when it may do so, unless its purpose to effect that result is clearly manifest." In Missouri, Kansas & Texas Railway Company v. Haber (169 U. S. 613 at p. 623) it was said by the same learned Justice: "May not their statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserve power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of
88 a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." (See also Smith v. Alabama, 124 U. S. 465.) In Olsen v. Smith, (195 U. S. 332) it was held that state laws regulating pilotage, although regulative of commerce, fall within that class of powers which may be exercised by the state until Congress has seen fit to act upon the subject. In Reid v. Colorado (supra) the court asserted that when the entire subject of the transportation of live stock from one state to another is taken

under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matter and covering the same ground would cease to have any force whether formerly abrogated or not. The Court, however, held that the act of Congress (23 U. S. Stat. c. 60) known as the Animal Industry Act did not cover the whole subject of the transportation of live stock from one state to another and that therefore the state may protect its people and their property against such dangers. That case considered the question whether a statute of the State of Colorado was in violation of the Constitution of the United States or in conflict with the power of Congress over interstate commerce. In rendering the opinion of the Court Mr. Justice Harlan said: "But the difficulty with the defendant's case is that Congress has not by any statute covered the whole subject of transportation of live stock among the several states, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the state of the power, by appropriate regulations to protect their domestic animals against contagious, infectious and communicable diseases, (at page 147). * * * "The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their prop-
89 erty against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case, or unreasonably burden the exercise of privileges secured by the Constitution of the United States" (at page 151). In Erie Railroad Co., v. New York, 233 U. S. 671, the United States Supreme Court had under review a state and Federal Statute both of which assumed to prescribe the hours of service for certain operators engaged in interstate commerce. The state statute assumed to supplement the Federal Statute and to legislate upon the same subject-matter and the court held that the act of Congress was paramount and that the state statute must yield to it.

The state in the Workmen's Compensation Law has assumed to deal with all industrial accidents whether they be the result of negligence or not. The suggestion is made that in so doing the state has required employers to contribute to an insurance fund upon the assurance that such contribution relieves them of all further liability and yet so far as accidents resulting from negligence occur to those engaged in interstate commerce, the employer may still be subject to a liability under the provisions of the Federal Employers' Liability Act. This apparent difficulty disappears when we distinguish between the different spheres in which the Federal and State statutes operate. So far as accidents result to those engaged in interstate commerce, the whole subject is, when Congress assumes to deal with it excluded from the operation of state regulation. As to accidents to those engaged in interstate commerce resulting from negligence, which are within the Federal Employers' Liability Act, Congress has assumed to deal with the subject and therefore all state regulations within that sphere must be inoperative. In so far as the separate and distinct field of compulsory insurance against accidents not the re-

sult of negligence by the employers is concerned, Congress has
90 not assumed to act upon the subject and until such time as Congress does enter this distinct and separate field, it is open to occupancy by the state, provided only that in occupying it, the state does not go beyond the necessities of the case or unreasonably burden the exercise of the privileges secured by the Constitution of the United States. While it is true that our state statute in terms is broad enough to cover accidental injuries caused by negligence and those that are not caused by negligence, that portion of it which affects accidental injuries caused by negligence, resulting to those engaged in interstate commerce, which are within the Federal Employers' Liability Act, is as ineffective and inoperative as if it had not been enacted. The legislature intended that injuries resulting from negligence, to those engaged in interstate commerce, which are within the Federal Statute, should not be affected by the provision of the state statute. This is evident from the provisions of section 114 of the Workmen's Compensation law. That section provides as follows:

"Interstate Commerce. The provisions of this chapter shall not apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

In the matter of Jansen (supra) this court pointed out that literally construed, section 114 "makes the statute apply only to intrastate work, either done by itself or in connection with, but
clearly separable and distinguishable from, interstate and
91 foreign commerce." The court then remarked that "though the section is awkwardly phrased, it is manifest that a broader application was intended" (p. 521). Thus viewing the matter, we held in that case that the provisions of the state statute applied to accidental injuries received in interstate as well as intrastate work except those injuries received while engaged in interstate or foreign commerce for which "a rule of liability or method of compensation has been or shall be established by the Congress of the United States." Writing for the court in that case Judge Miller referring to the statute said: "In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States. But it is said that Congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule "may be established," etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intra-

state work, the legislature would doubtless have said so in a sentence. The words 'may be' should be construed in the sense of 'shall be'." Moreover in the last sentence of section 114 it is made clear that the act applies to employers and employees working only in the state, "subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress." In so far as employers and employees working in this state are engaged in interstate commerce and injuries result to the employees which are not the result of negligence and are not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or result from his intoxication while on duty, Congress not having legislated upon the subject, the state statute is operative. The insurance fund created by the state statute is not for the benefit of those who are within the Federal stat-
92 ute. Nor does the *the* state statute assume to release employers who contribute to the insurance fund from liability imposed by the Federal Statute. In all such cases, the state statute, imposes no liability and does not relieve from liability, for such accidents. All accidents of that character are governed by the Federal Employers' Liability Act. In regard to such accidents it is not within the jurisdiction of the state, either to create a liability or to relieve from it. The contribution which the employer makes to the insurance fund under the state statute, relieves him of liability to his employees in cases which are not within the Federal statute. But accidents, resulting from negligence to those engaged in interstate commerce, which are within the Federal statute, are now exclusively within the sphere of Federal jurisdiction and as to them the state cannot create or take away liability. It is also urged that the state statute imposes inevitable liability upon the employer and sanctions in some cases a two-fold recovery. If a claim is made, under the state statute against an employer and the employer pleads that the employee was injured in interstate commerce as a result of the Employer's negligence the question will be presented whether the employer shall be permitted to urge his negligence to defeat the claim of his employee. That question is not how presented and we think discussion of it should be reserved until it arises. This much however, without impropriety may be said, if the claim of the employer that the injury was the result of his negligence should be upheld, and the case should be within the Federal statute, the employer would not be subjected to a double recovery, because in this event there could be no recovery under the state statute. If the injury was not the result of negligence an award under the state statute could be made, but in such cases there could be no recovery under the Federal Employers' Liability Act and hence the employer could not be subjected to a double recovery.

93 The other questions urged upon us by the appellant have already been discussed in the Matter of Jensen (supra) and do not require further discussion by us.

It follows that decision of the Appellan*t* Division should be affirmed with costs.

94 [Endorsed:] No. 444. Court of Appeals. In the Matter of James-Winfield, employee, Respondent, against New York Central & Hudson River Railroad Company, Appellants. Opinion by Seabury, J. S. HO. CHA. CHJ. HIS. CD. CAR.

95 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties hereto, pursuant to rule 8 of the Supreme Court of the United States, that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States, and that the Clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers herein designated as follows:

Statement under Rule 41 of the General Rules of Practice,
Employee's Notice of Injury,
Employee's First Notice of Injury to Commission,
Employee's First Notice of Injury to Employer,
Employee's Claim for Compensation,
Employer's First Report of Injury,
Attending Physician's Report,
Notice of Hearing for Adjustment of Claim,
Employer's Affidavit of James Winfield,
Employer's Affidavit of Eugene Bronk,
Employer's Affidavit of George W. Vaughn,
Employer's Affidavit of A. A. Stern, M. D.,
Employer's Affidavit of James R. Nelson, M. D.,
96 Minutes of Hearing,
Affidavit of James Winfield,
Employer's Requests to Find,
Decision and Award of Commission,
Employer's Notice of Exceptions,
Employer's Notice of Appeal,
Stipulation Waiving Certification in Appellate Division,
Affidavit of No Opinion by Commission,
Order of Chairman to File with the Appellate Division,
Order Settling & Filing Case,
Appellate Division Opinion for Affirmance,
Dissenting Opinion, per Smith, P. J. in Appellate Division,
Appellate Division Order of Affirmance,
Commission's Order of Affirmance,
Employer's Notice of Appeal to the Court of Appeals,
Stipulation Waiving Certification in Court of Appeals,
Employer's application, June 23, 1914,
Employer's letter of transmission, June 23, 1914,

Employer's letter to Commission, June 26, 1914,
Commission's letter to Employer, June 29, 1914,
Employer's letter to Commission, July 1, 1914,
Commission's letter to Employer, July 21, 1914,
Employer's undertaking, July 21, 1914,
Employer's agreement, July 21, 1914,
Stipulation as to supplemental papers in Court of Appeals,
Judgment of the Court of Appeals,
Order of Appellate Division entered on judgment of Court of Appeals,
Opinion of Judge Seabury in the Court of Appeals.
Dated, December 9th, 1915.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
BRINNIER & CANFIELD,
Attorneys for Respondent.

EGBURT E. WOODBURY,
Attorney General,
Attorney for Industrial Commission.

97 [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of James Winfield, employee, Respondent, against New York Central and Hudson River Railroad Company, employer, Appellant. Stipulation Pursuant to Rule 8 of the U. S. Supreme Court. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

98 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of said court do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of James Winfield, employee, respondent, against The New York Central and Hudson River Railroad Company, employer, appellant, as set forth in the annexed stipulation, bearing date December 9th, 1915, and made pursuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto, and also of the opinions rendered in this court and by Judge Seabury of the Court of Appeals herein, as the same now appear on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed

the seal of said court at my office in the City of Albany, State of New York, this 11th day of December, 1915.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

99 [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of James Winfield, employee, Respondent, against New York Central and Hudson River Railroad Company, Employer, Appellant. Authentication of Record. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

99½ Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

UNITED STATES OF AMERICA,
State of New York, Third Judicial Department, ss:

In obedience to the commands of the writ of error herein allowed December 6th, 1915, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portions of the record and proceedings in the above entitled cause, as, in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parties hereto have by stipulation designated, with all things concerning the same.

In Testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 11th day of December, 1915.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

99¾ [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of James Winfield, employee, Respondent, against New York Central and Hudson River Railroad Company, Employer, Appellant. Return to Writ of Error. Visscher, Whalen & Austin, Attorneys for Appellant. Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

100 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
JAMES WINFIELD, Defendant-in-Error.

Prayer for Reversal.

To the Supreme Court of the United States:

Comes now The New York Central Railroad Company, plaintiff in error, and prays for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the Clerk of the Appellate Division thereof, in the Third Judicial Department of said state, on the 29th day of November, 1915, affirming a decision and award of the Workmen's Compensation Commission of said state, a reversal of which is likewise prayed, entered on the 17th day of November, 1914; and plaintiff in error further prays for a reversal of a judgment of the Court of Appeals of said state, rendered on the 23d day of November, 1915, upon which said order hereinbefore first mentioned was entered.

And your petitioner will ever pray.

Dated, December 3rd 1915.

H. LEROY AUSTIN,
Of Counsel for The New York Central Railroad Company.

101 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
JAMES WINFIELD, Defendant-in-Error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of The New York Central Railroad Company, a corporation organized and incorporated by agreement of consolidation bearing date April 29, 1914, and recorded in the office of the Secretary of State of the State of New York December 22, 1914, between several railroad corporations, among others, The New York Central and Hudson River Railroad Company (hereinafter designated as said railroad company), and to whose rights and liabilities your petitioner, by virtue of the statutes of the State of New York in such case made and provided, has succeeded, respectfully shows:

First. On or about the 22nd day of August, 1914, the above named James Winfield commenced before the State Workmen's Compensation Commission of the State of New York a special proceeding against said railroad company and therein alleged:

(*a.*) That said James Winfield, at about 1:30 P. M. on the 11th day of August, 1914, while employed as a section hand by said railroad company, upon the West Shore Railroad, near Lake Katrine station, in the County of Ulster, State of New York, was engaged in tamping ties with a pick, and that while he was so engaged a stone or pebble rebounded from the ballast, of which the stone or pebble was a part, between the ties, struck said James Winfield in the right eye and
102 destroyed the sight thereof. In said proceeding no negligence or other fault on the part of any one, in connection with said injury to said James Winfield, was alleged, or proved or found.

(*b.*) That by the loss of his right eye said James Winfield had become permanently partially disabled and entitled to be awarded by said Workmen's Compensation Commission compensation, payable by said railroad company, in accordance with the provisions of chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law.

Second. In said proceeding before said Commission said railroad company appeared and alleged that said James Winfield, when he sustained said injury, was employed by said railroad, which was then engaging as a common carrier by rail, in commerce between the States of New York and New Jersey, to wit, in maintaining and repairing, as an instrumentality of such commerce, railroad tracks over which said railroad company operated trains, carrying both passengers and freight, from points in the State of New York to points in the State of New Jersey, as well as from points in the State of New Jersey to points in the State of New York.

Third. Said railroad company contended in said proceeding before said Commission:

(*a.*) That said James Winfield was not entitled to recover compensation for said injury from said railroad company, under the provisions of said Workmen's Compensation Law, because the liability, if any, of said railroad company to said James Winfield for said injury was defined and limited exclusively by the provisions of the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases. Approved
103 April 22, 1908," as amended April 5, 1910, and commonly known as the Federal Employers' Liability Act.

(*b.*) That to award to said James Winfield compensation for said injury, under the provisions of said Workmen's Compensation Law, would deprive said railroad company of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(*c.*) That to award to said James Winfield compensation for said injury, under the provisions of said Workmen's Compensation Law, would deny to said railroad company the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Fourth. After hearing the allegations and proofs of the parties, said State Workmen's Compensation Commission rendered its written decision and award, which was entered November 17, 1914, wherein said Commission found and decided that said James Winfield, at

the time and place alleged by him as aforesaid, and while engaged, as a section hand, in tamping ties in connection with the ballasting of tracks over which said railroad company was accustomed to operate trains carrying passengers and freight in transit between points in the State of New York and points in the State of New Jersey, was struck by a pebble or small stone in the eye, the sight of which he thereby lost; that the injury so sustained by said James Winfield was accidental, and arose out of and in the course of his employment; that said James Winfield was entitled to receive, and he was thereby awarded compensation, to be paid by said railroad company, at the rate of six dollars and fifty-four cents ($6.54) per week, which weekly payment by the terms and provisions of said Workmen's Compensation Law, said railroad company was required to continue to pay for a period of one hundred twenty eight weeks. Said Commission also over ruled all
104 and singular the three contentions of said railroad company specified in paragraph third of this petition.

Fifth. From said decision and award of said Compensation Commission said railroad company duly appealed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, said railroad company, through its counsel, duly urged, among other things, against the validity of said decision and award of said Compensation Commission all and singular the contentions hereinbefore specified in paragraph third of this petition, but said Appellate Division of the Supreme Court overruled each of the contentions aforesaid and, by an order bearing date May 4, 1915, and entered in the office of the Clerk of said Appellate Division on the 10th day of May, 1915, said Appellate Division affirmed said decision and award of said Compensation Commission entered on the 17th day of November, 1914.

Sixth. From said order of said Appellate Division said railroad company duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of the State of New York in which could be had a decision of the questions so raised by said contentions of said railroad company and hereinbefore specified in paragraph third of this petition, and which contentions, among other things, said railroad company through its counsel duly urged upon the argument of said appeal to the Court of Appeals of the State of New York which duly came on to be heard. But said Court of Appeals of the State of New York overruled each of the contentions of said railroad company and, by its judgment rendered November 23, 1915, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur,
105 consisting of a copy of the said judgment of said Court of Appeals and of the papers upon which said Court of Appeals made its said judgment, and said remittitur was filed on the 29th day of November, 1915, in the office of the Clerk of said Appellate Division where said remittitur now remains of record. Upon said

remittitur an order was entered on the 29th day of November, 1915, in the office of the Clerk of said Appellate Division, whereby the said judgment of the Court of Appeals herein became the order of said Appellate Division, and the sum of One hundred three Dollars and sixty-five cents ($103.65), costs of said appeal to the said Court of Appeals, was awarded against said railroad company.

Seventh. Under and by virtue of the provisions of chapter 674 of the Laws of 1915, effective May 22, 1915, of the State of New York, said Workmen's Compensation Commission was abolished, and the duties and functions thereof, as prescribed by said chapter 41 of the Laws of 1914, were devolved upon the State Industrial Commission, which is composed of John Mitchell, Louis Wiard, William H. H. Rogers, Edward P. Lyon and James M. Lynch who, as such Industrial Commission, appeared by the Attorney General of the State of New York in said Court of Appeals in support of the validity of said order of the said Appellate Division thus brought up for review by said appeal to said Court of Appeals.

Wherefore your petitioner prays that a writ of error may be allowed and issued, directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record and papers in said special proceeding and for citation and supersedeas to stay execution, to the end that the errors of which your petitioner complains herein and in the assignment of
106 errors herein filed may be reviewed and, if errors be found, corrected conformably to the constitution and laws of the United States.

And your petitioner will ever pray.

Dated, December 3rd, 1915.

THE NEW YORK CENTRAL
RAILROAD COMPANY,
By H. LEROY AUSTIN, *Counsel.*

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is the regularly retained counsel for the petitioner, The New York Central Railroad Company, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true. That the reason why this verification is made by deponent is that said petitioner is a corporation, none of whose officers resides or is within the County of Albany, State of New York, where deponent resides and has his place of business.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 3rd day of December, 1915.

[Seal Edna M. Sager, Notary Public, Albany County, N. Y.]

EDNA M. SAGER,
Notary Public, Albany County, N. Y.

107 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
JAMES WINFIELD, Defendant-in-Error.

Comes now The New York Central Railroad Company, plaintiff in error, and makes and files this its assignment of errors:

1. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered November 23, 1915, the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered May 10, 1915, erred, as did also said Appellate Division and the State Workmen's Compensation Commission of the State of New York, in overruling the contention of the New York Central and Hudson River Railroad Company that its liability, if any, to James Winfield, for his injury for which he has sought compensation in this proceeding, is defined and limited, exclusively, by the provisions of the Act of Congress, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases. Approved April 22, 1908", as amended April 5, 1910, and commonly known as the Federal Employers' Liability Act, and in holding that said Federal Employers' Liability Act does not define and limit, exclusively, the liability, if any, of the New York Central and Hudson River Railroad Company to said James Winfield for his said injury.

2. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered November 23, 1915, the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered May 10, 1915, erred, as did also said Appellate Division and the State
108 Workmen's Compensation Commission of the State of New York, in overruling the contention of the New York Central and Hudson River Railroad Company that to award to the above named James Winfield compensation in this proceeding, under the provisions of chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, would deprive the New York Central and Hudson River Railroad Company of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered November 23, 1915, the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered May 10, 1915, erred, as did also said Appellate Division and the State Workmen's Compensation Commission of the State of New York, in overruling the contention of the New York Central and Hudson River Railroad Company that to award to the above named James Winfield compensation in this proceeding, under the provisions of chapter 41 of the Laws of 1914 of the State of New York, commonly known

as the Workmen's Compensation Law, would deny to the New York Central and Hudson River Railroad Company the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated, December 3rd, 1915.

H. LEROY AUSTIN,
Of Counsel for The New York Central Railroad Company.

109–118 [Endorsed:] Original. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against James Winfield, Defendant-in-Error. Prayer for Reversal, Petition for Writ of Error and Assignment of Errors. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York and to the Honorable Justices Thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the order, of a plea which is in the said Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, before you, or some of you, upon a judgment of the Court of Appeals of the State of New York, being the highest court of law or equity of the said state in which a decision could be had, in the suit or special proceeding between James Winfield and The New York Central and Hudson River Railroad Company, wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision was in favor of their validity; and wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The New York Central and Hudson River Railroad Company, as appears by the complaint of the New York Central Railroad Company, as the successor to the rights and liabilities of the New York Central and Hudson River Railroad Company: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
120 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 3rd day of January next, in the said Supreme

Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 6th day of December in the year of our Lord one thousand nine hundred and fifteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by:
CHARLES E. HUGHES,
Associate Justice of the Supreme
Court of the United States.

121 [Endorsed:] Original. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against James Winfield, Defendant-in-Error. Writ of Error. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error. Office and Post-Office Address 19 Tweddle Building, Albany, N. Y. Due and personal service of a copy of the within — is admitted this — day of ——, 191–. —— ——, Attorneys for —— ——.

122 UNITED STATES OF AMERICA, *ss:*

To James Winfield and John Mitchell, Louis Wiard, William H. H. Rogers, Edward P. Lyon and James M. Lynch, as and Composing the State Industrial Commission of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, wherein The New York Central Railroad Company is plaintiff in error and James Winfield, above named, is defendant in error, to show cause, if any there be, why the judgment and order rendered against The New York Central and Hudson River Railroad Company, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 6th day of December in the year of our Lord One thousand Nine Hundred and Fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme
Court of the United States.

123 [Endorsed:] Original. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-

in-Error, against James Winfield, Defendant-in-Error. Citation. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error. Office and Post-Office Address 19 Tweddle Building, Albany, N. Y. Due and personal service of a copy of the within citation is admitted this 9th day of December, 1915. Egburt E. Woodbury, Attorney-General, Attorney for State Industrial Commission. Brinnier & Canfield, Att'ys for Respondent.

124 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,
against
JAMES WINFIELD, Defendant in Error.

Know all men by these presents, that The National Surety Company of New York, a corporation organized and existing under and by virtue of the Laws of the State of New York, and having its principal place of business at 115 Broadway, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto James Winfield in the sum of Two thousand Dollars, lawful money of the United States, to be paid to said James Winfield, his executors, administrators and assigns, for which payment, well and truly to be made, said The National Surety Company of New York binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with the seal of said The National Surety Company of New York and dated this 3rd day of December, 1915.

Whereas the above named The New York Central Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York entered on the 29th day of November, 1915, affirming a decision and award of the Workmen's Compensation Commission of said state, a reversal of which is likewise sought, as well as, also, a reversal of judgment in the Court of Appeals of said state, rendered on the 23d day of November, 1915, upon which said order hereinbefore first mentioned was entered.

125 Now, therefore, the condition of this obligation is such that if the above named The New York Central Railroad Company shall prosecute its said writ of error to effect and, if it fail to make its plea good, shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and virtue.

THE NATIONAL SURETY COMPANY OF NEW YORK.
By BORDEN H. MILLS, *Res. Vice President.*

Attest:
[SEAL.] T. FRANCIS GRAHAM,
Res. Assistant Secretary.

Approved this 6th day of December, 1915, to act as a supersedeas.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

126 STATE OF NEW YORK,
County of Albany, ss:

On this 3rd day of December, 1915, before me personally appeared Borden H. Mills, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of Albany; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Borden H. Mills further said that he is acquainted with T. Francis Graham and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said T. Francis Graham subscribed to the said instrument is in the genuine handwriting of the said T. Francis Graham and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

[L. S.] CHAS. H. MILLS.
Notary Public, Albany Co., N. Y.

127 For use in New York State and other states which do not require published figures to conform to statement furnished the department of such state after audit by them.

National Surety Company of New York.

Financial Statement, December 31st, 1914.

Wm. B. Joyce, President.
Hubert J. Hewitt, Secretary.

Assets.

Cash in Banks and Offices	$830,566.89
Government, Municipal and Other Bonds, and Stocks	5,432,304.10
Real Estate, Mortgages and Collateral Loans	140,880.88
Unpaid Premiums (excluding Premiums 90 days overdue)	583,102.87
Accrued Interest and Accounts Receivable	449,820.26
Total	**$7,436,675.00**

Liabilities.

Unearned Premium Reserve	$1,915,193.77
Reserve for Contingent Claims (Less Reinsurance)	1,204,387.65
Contingent Reserve for Loss Expense	67,813.56
Anticipated Taxes (due 1915) and Unpaid Commissions (not due)	188,825.60
Accounts Payable (not due)	98,499.16
Dividend Declared (Paid Jan. 2nd 1915)	60,000.00
Capital Stock	2,000,000.00
Reserve Fund	401,955.26
Surplus	†1,500,000.00
Total	$7,436,675.00

†In computing this surplus no deduction is made on account of so called "special" deposits made under the laws of the various states, etc., the net amount being $25,424.95.

STATE OF NEW YORK,
County of New York, ss:

Wm. I. Hawks, being duly sworn, says: That he is Assistant Secretary of the National Surety Company, that said Company is a Corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of New York applicable to said company, and is duly qualified to act as Surety under such Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full, true and correct statement of the financial condition of said Company on the 31st day of December, 1914.

WM. I. HAWKS.

Sworn to before me this 1st day of February, 1915.

[SEAL.]

WM. M. WEAVER,
Notary Public for New York County No. 4020. Certificate filed in Kings, Nassau, Queens, Bronx, Richmond and Westchester Counties. New York County Register's office No. 6006; Kings County Register's office No. 6000, Bronx County Register's office No. 619.

My commission expires March 30, 1916.

128 [Endorsed:] Copy. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error,

against James Winfield, Defendant-in-Error. Bond. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error, Office and Post-Office Address, 19 Tweddle Building, Albany, N. Y.

129 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of JAMES WINFIELD, Employee, Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of said court, do hereby certify that there have been lodged with me, as such clerk, this day, in the above entitled cause:

1. The original bond of which a copy is hereto annexed.

2. Two copies of the writ of error as herein set forth, one for the defendant in error above and one to file in my office.

3. One copy of the petition, assignment of error and prayer for reversal herein.

In Testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 11th day of December, 1915.

[Seal Supreme Court Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

130 [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of James Winfield, employee, Respondent, against New York Central and Hudson River Railroad Company, employer, Appellant. Certificate of Lodgment. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 19 Tweddle Building, Albany, N. Y.

Endorsed on cover: File No. 25,045. New York Supreme Court, Appellate Division, Third Judicial Department. Term No. 762. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. James Winfield. Filed December 15th, 1915. File No. 25,045.

FILED
DEC 18 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 761 320

THE NEW YORK CENTRAL RAILROAD COMPANY

Plaintiff-in-Error

against

SARAH WHITE

Defendant-in-Error

No. 762 321

THE NEW YORK CENTRAL RAILROAD COMPANY

Plaintiff-in-Error

against

JAMES WINFIELD

Defendant-in-Error

MOTION TO ADVANCE

H. LEROY AUSTIN

Attorney for Plaintiff-in-Error

ROBERT E. WHALEN

Of Counsel

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error, *against* SARAH WHITE, Defendant-in-Error.	OCTOBER TERM, 1915. No. 761.
THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error, *against* JAMES WINFIELD, Defendant-in-Error.	OCTOBER TERM, 1915. No. 762.

On writs of error to the Appellate Division of the Supreme Court, Third Department, State of New York.

MOTION TO ADVANCE.

Now comes the plaintiff-in-error and respectfully moves the court to advance these causes for hearing during the present term, preferably, if convenient to the court, on the 21st day of February, 1916.

STATEMENT.

These causes come here by writs of error to review decisions of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, each rendered upon a judgment of the Court

of Appeals of said State. They have been argued together in the respective appellate courts of the State of New York, present similar questions, and involve (a) the constitutionality of the Workmen's Compensation Law of the State of New York, and (b) the applicability of said law in cases where a railroad employee, otherwise within the provisions of the Federal Employers' Liability Act, is injured or killed *without negligence*.

In the White case, one Jacob White, in the employ of the New York Central and Hudson River Railroad Company, was accidentally killed while at work as a night watchman in connection with the construction of buildings and tracks used by the railroad as instrumentalities of interstate commerce.

In the Winfield case, defendant-in-error, while tamping ties under tracks over which the New York Central and Hudson River Railroad Company ran interstate trains, lost the sight of an eye which was struck by a stone that bounded up from the ballast between the ties.

Before the State Workmen's Compensation Commission, in the Appellate Division and in the Court of Appeals the employer urged that the Workmen's Compensation Law, if applied in these cases, would deprive the employer of its property without due process of law, would deny to it the equal protection of the laws, and would conflict with paramount provisions of the Federal Employers' Liability Act. All of such contentions have been overruled below, and in the Winfield case the Court of Appeals has held, in an opinion by Judge Seabury, that, where no charge of negligence is involved, compensation, as prescribed by said Workmen's Compensation Law, is payable for disability or death, resulting from accidental personal injuries, and that the Federal mployers' Liability Act is without application.

REASONS FOR ADVANCEMENT.

I.

The same reasons obtain in these cases as moved this court recently to advance the cases of Southern Pacific Company v. Jensen (No. 700) and Clyde Steamship Company v. Walker (No. 701), which have been set for argument on February 21st, 1916.

II.

So far as the constitutional questions above mentioned are concerned, they are identical with those which are presented in the cases of Jensen and Walker above mentioned.

III.

A very large number of cases are pending wherein awards for compensation have been made for disability or death resulting from personal injuries sustained while an employee was concededly employed by the railroad, which was then engaging, in interstate commerce, but wherein no charge of negligence was involved. In each such instance appeals have been taken, the ultimate disposition of which must be governed by the decision of this court in these causes, pending which payment of the awards thus made has been stayed.

H. LEROY AUSTIN,
Attorney for Plaintiff-in-Error.

ROBERT E. WHALEN,
Of Counsel.

Dated December 16th, 1915.

We concur in this motion.

EGBURT E. WOODBURY,
Attorney General of the State of New York.

BRENNIER & CANFIELD,
Attorneys for Defendant-in-Error Winfield.

FILED
FEB 3 1916
JAMES D. MAHER
CLERK

BRIEF OF PLAINTIFF-IN-ERROR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 321

THE NEW YORK CENTRAL RAILROAD COMPANY,
PLAINTIFF-IN-ERROR,

vs.

JAMES WINFIELD,
DEFENDANT-IN-ERROR.

In Error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

H. LEROY AUSTIN, ALBANY, N. Y.,
Attorney for Plaintiff-in-Error.

FRANK V. WHITING, NEW YORK CITY,
WILLIAM L. VISSCHER, ALBANY, N. Y.,
ROBERT E. WHALEN, ALBANY, N. Y.,
Counsel for Plaintiff-in-Error.

INDEX.

PAGE.

Statement of the case 5
Specification of errors 8
Argument 8
Statement of facts 8

I. Commission without power to make award 9
1. Claimant injured while employed by railroad in interstate commerce 9
2. Federal Employers' Liability Act alone governs Winfield's claim 11

II. Absence of negligence does not render Compensation Act operative 15
1. Error below in holding Compensation Act applicable 15
2. Decisions below impose inevitable liability and sanction alternative recovery 16
3. In absence of negligence, interstate carrier by railroad not liable 18
4. Result in State courts narrows scope of Federal Act 25
5. Opinion of Court of Appeals cannot be sustained 29

III. Compensation Act itself precludes an award 34
1. Such are its terms 34
2. So the cases hold 35

IV. Compensation Act violates due process and equal protection clauses of the Fourteenth Amendment 37

V. Right to test Compensation Act not waived 38

Conclusion 38
Appendix "A," New York Workmen's Compensation Law 40
Appendix "B," Schedule of State laws, voluntary and compulsory 87

ALPHABETICAL LIST OF CASES CITED.

CASES.	REPORTED.	PAGE
Atlantic Coast Line R. R. v. Burnette	239 U. S., 199	13, 39
Central R. R. Co. of N. J. v. Colasurdo	192 Fed., 901	11
Central Vt. Ry. v. White	238 U. S., 507	14
Charleston & Car. R. R. v. Varnville Co.	237 U. S., 597	28
Chic., R. I. & P. Ry. v. Devine	239 U. S., 52	14
Colasurdo v. Central R. R. of N. J.	180 Fed., 832	11, 16
Connole v. Norfolk & W. Ry. Co	216 Fed., 823	37
Employers' Liability Cases.	207 U. S., 463	15
Jensen, Matter of, v. Southern Pacific Co.	215 N. Y., 514	35
Lombardo v. B. & M. R. R.	223 Fed., 427	11
Mich. Cent. R. R. v. Vreeland	227 U. S., 59	12, 38
N. Y. Central R. R. v. Hudson County	227 U. S., 248	20
Nor. Car. R. R. Co. v. Zachary	232 U. S., 248	12
Nor. Pac. Ry. Co. v. State of Washington	222 U. S., 370	33
Pedersen v. Del., Lack. & West. R. R.	229 U. S., 146	10
Post, Matter of	N. Y. Law Journ., Jan. 24, 1916	5, 29
San Pedro, L. A. & S. L. R. Co. v. Davide	210 Fed., 870	11
Seaboard Air Line v. Horton	233 U. S., 492	20, 34, 36, 38
Second Employers' Liability Cases	223 U. S., 1	11, 14, 15
Shanks v. D., L. & W. R. R.	January 10, 1916	10
Smith v. Industrial Accident Commission	147 Pac. Rep., 600	22
Southern Ry. Co. v. R. R. Commission	236 U. S., 439	19, 28
Staley v. Illinois Central R. R. Co.	186 Ill. App., 593	22
	109 N. E., 342	22

CASES.	REPORTED.	PAGE
St. Louis, I. Mtn. & S. Ry. v. Hesterly	228 U. S., 702	12
St. Louis, I. M. & S. Ry. v. McWhirter	229 U. S., 265	25
St. L. & San Francisco Ry. v. Seale	229 U. S., 156	12
Taylor v. Taylor	232 U. S., 363	13
Toledo, St. L. & West. R. R. Co. v. Slavin	236 U. S., 454	21
Tralich v. Chic., M. & St. P. Ry. Co.	217 Fed., 675	11
Wabash R. R. v. Hayes	234 U. S., 86	13
Winfield, Amy L., v. The Erie R. R. Co.	New Jersey Court of Errors (not yet reported)	24
Winfree v. Nor. Pac. Ry. Co.	227 U. S., 296	31
Zikos v. Oregon R. & Navigation Co.	179 Fed., 893	11

Brief for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 762.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,
against
JAMES WINFIELD,
Defendant-in-Error.

In error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

Statement of the Case.

This case involves:

(a). The constitutionality, under the Fourteenth Amendment, of chapter 41 of the Laws of 1914 of New York, entitled "Workmen's Compensation Law."

(b). The applicability of the Workmen's Compensation Law where a railroad employee, while concededly employed in interstate commerce by the railroad, which also is then engaging in interstate commerce within the provisions of the Federal Employers' Liability Act, is injured without negligence.

A copy of said Workmen's Compensation Law, marked Appendix "A," is annexed to this brief.

Very recently it has been declared by the Court of Appeals to be compulsory.

Matter of Post, New York Law Journal, Jan. 24, 1916.

This proceeding was commenced by defendant-in-error before the State Workmen's Compensation Commission of the State of New York, a commission established by said law and superseded by the State Industrial Commission, to recover under said compensation law for the loss of his right eye through injuries sustained by Winfield while employed as a section hand on the West Shore division of the New York Central and Hudson River Railroad Company, predecessor in interest to the plaintiff-in-error, but in said proceeding negligence as a cause of such injury was neither alleged nor proven nor found.

There were no pleadings before the commission in this matter, which had its inception when the claimant filed with the commission and served upon the railroad company notices of his injury (Transcript, pp. 2-3), which were supplemented by his claim for compensation, which he verified and filed with the commission. (Transcript, pp. 6-7.)

Before the commission the matter was heard summarily upon the claimant's notices of injury and notice of claim for compensation, the employer's report of injury filed with the commission, the report of the claimant's attending physician, and affidavits filed by both claimant and employer. (Transcript, pp. 7-15.)

To the rendition of any award of compensation the railroad company interposed before the commission the following objections:

(a). That the liability, if any, for the injury to claimant, who, when he sustained his injury, was employed by the railroad, which was then engaging in commerce between the States of New York and New Jersey, was defined and limited exclu-

sively by the provisions of the Federal Employers' Liability Act.

(b). That to award compensation to claimant for such injury under the provisions of said Workmen's Compensation Law, would deprive the railroad company of its property without due process of law in contravention of the Fourteenth Amendment to the Federal Constitution.

(c). That to award such compensation would deny to the railroad company the equal protection of the laws in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution. (Transcript, p. 16.)

The commission, however, one of its members dissenting, made its "decision and award," as the statute designates the determination of the commission, containing "conclusions of fact and rulings of law," as they are called in section 20 of the Workmen's Compensation Law, and awarded to the claimant compensation at the rate of $6.54 per week. (Transcript, pp. 17-18.) To the decision and award of the commission, as well as to the refusal of the commission to make findings in accordance with the railroad's requests, the railroad filed exceptions. (Transcript, pp. 15-16, 18-19.)

On appeal taken by the railroad company to the Appellate Division of the Supreme Court, Third Judicial Department, the court, by a vote of three to two, affirmed the award made by the commission, the prevailing and dissenting opinions in the Appellate Division being printed at pages 22-27 of the Transcript (168 App. Div., 351).

The Appellate Division's order of affirmance, on appeal therefrom taken by the railroad company to the Court of Appeals, was in turn affirmed (216 N. Y., 284), Judge Seabury writing an opinion which is printed at pages 43-49 of the Transcript. The judgment of affirmance rendered by the Court of Appeals was remitted to the Appellate Division, to which the New York Central Railroad Company,

as successor in title and in interest to the New York Central and Hudson River Railroad Company, has prosecuted a writ of error from this court. (Transcript, pp. 40-42, 58.)

Specification of errors.

Plaintiff-in-error contends:

1. That the Court of Appeals, as also the Appellate Division and the Workmen's Compensation Commission, erred in not holding that the liability, if any, of the railroad for injury to defendant-in-error is defined and limited exclusively by the provisions of the Federal Employers' Liability Act.

2. That the Court of Appeals, as also the Appellate Division and the Workmen's Compensation Commission, erred in not holding that to award to defendant-in-error compensation for his injury, under the provisions of the Workmen's Compensation Law, would deprive the railroad of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. That the Court of Appeals, as also the Appellate Division and the Workmen's Compensation Commission, erred in not holding that to award to defendant-in-error compensation for his injury, under the provisions of the Workmen's Compensation Law, would deny to the railroad the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Argument.

Statement of Facts.

At about half-past one in the afternoon of August 11, 1914, while employed as a section hand by the railroad, Winfield sustained injuries which resulted in the loss of the sight of his right eye. (Transcript, pp. 2-7, 10, 12, 15, 17.)

At the time when he sustained such injuries, the claimant was engaged in performing his usual duties, at or near Lake Katrine in Ulster county, New York, such duties consisting of removing old and putting in new ties and switch timbers along and under a main track of the employer, in lining and ballasting the track, and otherwise keeping the track in a condition of maintenance and repair. (Transcript, pp. 2-5, 7, 10, 12.)

While so engaged, his particular work at the moment consisting in tamping ties under the rails of the track, a stone or pebble rebounded from the ballast (of which the stone or pebble was a part) between the ties and struck the claimant in his right eye, producing the injuries of which he complains. (Transcript, pp. 2-4, 6, 8, 12.)

Over the track upon which claimant was at work, when he sustained such injuries, the employer, as the commission has found, was accustomed to run and operate trains, carrying passengers and freight in transit between points in the State of New York and points in the State of New Jersey, as well as between points wholly in the State of New York. (Transcript, pp. 12-13, 17.)

POINT I.

The commission was without power to make the award under review.

1. *Claimant, when injured, was employed in interstate commerce by the railroad, which also was then engaging in interstate commerce.*

(a). The Compensation Commission's finding of fact is: "At the time of said accident, the Railroad Company was accustomed to operate trains over the tracks on which said Winfield was working, carrying passengers and freight in

transit between points in the State of New York and points in the State of New Jersey, as well as between points wholly in the State of New York." (Transcript, p. 17.) This finding has been affirmed by both of the appellate courts below.

(b). "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. * * * We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. * * * A track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

Pedersen v. Del., Lack. & West. R. R., 229 U. S., 146, 151-2.

(c). On January 10th, 1916, this court, in holding that the case then under review did not come within the provisions of the Federal Act, pointed out: "It is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation."

Shanks v. *D. L. & W. R. R.*, January 10, 1916.

(d). In accord with, or following, the decision in the Pedersen case, the Federal courts have held

that section men at work on interstate tracks are employed in interstate commerce.

Zikos v. *Oregon R. & Navigation Co.*, 179 Fed., 893, 897-8.

Colasurdo v. *Central R. R. of N. J.*, 180 Fed., 832, 837; aff'd., 192 Fed., 901.

Central R. R. Co. of N. J. v. *Colasurdo*, 192 Fed., 901, 903, a case cited with approval by this court in the *Pedersen* case (p. 152).

San Pedro, L. A. & S. L. R. Co. v. *Davide*, 210 Fed., 870, 872.

Tralich v. *Chic., M. & St. P. Ry. Co.*, 217 Fed., 675, 677.

Lombardo v. *B. & M. R. R.*, 223 Fed., 427, 431.

2. *Hence, the Federal Employers' Liability Act alone governs Winfield's claim to recover.*

(a). "Now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

Second Employers' Liability Cases, 223 U. S., 1, 55.

(b). "By this act Congress *has undertaken to cover the subject* of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States. * * * It therefore follows that in respect of state legislation, prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount

and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States." (Italics ours.)

Mich. Cent. R. R. v. *Vreeland*, 227 U. S., 59, 66-67.

(c). "The act of Congress supersedes state laws in the matter with which it deals."

St. Louis, I. Mtn. & S. Ry. v. *Hesterly*, 228 U. S., 702, 704.

(d). "The cause of action sought to be enforced was not recognized at common law. * * * It was essential, therefore, that it be based on some applicable statute. There was a Texas statute on the subject and also the Federal one. Both could not occupy the same field, and they were unlike. * * * If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution."

St. L. & San Francisco Ry. v. *Seale*, 229 U. S., 156, 157-8.

(e). "In order to bring the case within the terms of the Federal act (35 Stat. 65, c. 149, printed in full in 223 U. S., p. 6), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the Statutes of the State."

Nor. Car. R. R. Co. v. *Zachary*, 232 U. S., 248, 256.

(f). "The act has come up for consideration in a number cases. In *Mondou* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S., 1, it and its amendments were declared to be constitutional, that having been enacted in pursuance of a power reserved to Congress, state laws must give away to them. They established the policy for all, it was decided, and the courts of a State can not refuse to enforce them on the ground that they are not in harmony with the policy of the State."

Taylor v. *Taylor*, 232 U. S., 363, 368.

(g). "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative."

Wabash R. R. v. *Hayes*, 234 U. S., 86, 89.

(h). "At all events the act of Congress *creates the only obligation* that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source." (Italics ours.)

Atlantic Coast Line R. R. v. *Burnette*, 239 U. S., 199, 201.

(i). If a State rule of procedure, relative to the burden of proof on the issue of contributory negligence, must yield to the Federal rule upon the trial of an action brought under the Federal Employers' Liability Act, *a fortiori* must a State rule of substantive law give way

before a Federal statute which defines and limits a liability.

Central Vt. Ry. v. White, 238 U. S., 507, 511-512.

(j). The paramount scope of the Federal statute was recently declared by this court to have been "conclusively established by the previous decisions of this court concerning the exclusive operation and effect of the Employers' Liability Act over the subject with which it deals."

Chic. R. I. & P. Ry. v. Devine, 239 U. S., 52, 54.

(k). The foregoing excerpts from opinions of this court in cases subsequently decided, make plain the purpose and scope of the congressional will, as originally expounded by this court:

"It undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. * * * When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

Second Employers' Liability Cases, 223 U. S., 1, 51, 57.

POINT II.

Absence of any element of negligence in this case does not render operative the provisions of the State Workmen's Compensation Act.

1. *Error occurred below in holding to the contrary.*

(a). Because the title of the Federal Act of 1908 is "An Act relating to the liability of common carriers by railroad to their employees *in certain cases*," the prevailing opinion in the Appellate Division (Transcript, pp. 22, 24, 25) asserted that, in a case of injury or death to an interstate employee of a railroad, where negligence is neither established nor even claimed, a field remains for the operation of the State statute which prescribes liability without regard to negligence.

(b). But it will be borne in mind that the present Federal Act of 1908 was passed to meet the constitutional objection which had been held by this court to be fatal to the earlier Federal Act of 1906, the title of which was "An Act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employees."

The Employers' Liability Cases, 207 U. S., 463, 490.
Second Employers' Liability Cases, 223 U. S., 1, 6, 51-52.

(c). It is familiar history of the Congressional legislation upon the subject that the earlier Federal Act of 1906, not only by its

title but by its provisions, purported to prescribe liability on the part of a carrier engaged in interstate commerce to *any* of its employees when injured through its negligence, but because employees not engaged in interstate commerce at the time of an injury were thus included within the terms of the statute, this court was constrained to declare that Act unconstitutional. This court, however, having been at pains to indicate clearly the constitutional limits of a valid act, which must be applicable only to cases where both the carrier and the employee were, at the time of the injury, engaging and employed, respectively, in interstate commerce, Congress enacted the present Act of 1908, and took care, not only in the body of the statute, but in the title thereof as well, to keep within the bounds which this court had marked, by limiting the operation of the later statute to cases where, at the time of the injury, both the employer and the employee were engaging in commerce between the states. That such was the purpose of Congress in passing the Act of 1908 has been judicially declared.

Colasurdo v. *Cent. R. R. of N. J.*, 180 Fed., 832, 837.

2. *The decisions of the State courts impose inevitable liability and sanction an alternative recovery.*

(a). "It is urged," says the Appellate Division in its prevailing opinion, "that the claimant may claim under the Federal and the State statutes, thus securing a double compensation. That question must be met when it arises. * * * If a claim is made against the employer under the compensation law and he claims that law has no effect because his

employee was injured in interstate commerce by the negligence of the employer, it will then be for the court to determine whether the employer can urge his own negligence to defeat the employee's claim for compensation. *If he were not negligent, compensation must be made.*" (Transcript, pp. 24-25.)

(b). In the opinion of the Court of Appeals it is stated: "It is also urged that the State statute imposes inevitable liability upon the employer and sanctions in some cases a two-fold recovery. If a claim is made under the State statute against an employer and the employer pleads that the employee was injured in interstate commerce as a result of the employer's negligence, the question will be presented whether the employer shall be permitted to urge his negligence to defeat the claim of his employee. That question is not now presented and we think discussion of it should be reserved until it arises." (Transcript, p. 49.)

(c). In other words, to escape payment of compensation under the State Act, the interstate carrier by railroad, when brought before the State Commission upon a claim filed for injury or death to an interstate employee, must establish its own negligence, thus placing in the hands of the claimant material out of which to build up an action thereafter to be brought under the Federal Act! To assert, in the words of the prevailing opinion of the Appellate Division (Transcript, p. 25), that "these questions present no serious objection" or to regard them as academic, according to the view of the Court of Appeals (Transcript, p. 49), is to shut one's eyes to a palpable injustice, as the dissenting opinion in the Appellate Division points out. (Transcript, p. 27.)

(d). The necessary result would be that for injury or death of an employee of a railroad company there would be a recovery in all cases:

(1). For injury or death due to negligence, while engaged in interstate commerce, the recovery would be under the Federal Act.

(2). For injury or death due to negligence while engaged in intrastate commerce, the recovery would be under the State Compensation Law.

(3). For injury or death *without negligence*, whether engaged in interstate or intrastate commerce, the recovery would be under the State Compensation Law.

3. *In the absence of negligence, the interstate carrier by railroad can be held to no liability whatever.*

(a). The award made in this case has been sustained below solely upon the theory that it was competent for the Legislature of the State of New York, as a supplement to the Federal Act of 1908, to prescribe compensation where a railroad employee is injured or killed, *without negligence*, while employed by the railroad in interstate commerce.

(b). In February, 1915, this court, holding that safety appliance legislation of the State of Indiana must be regarded as superseded by the Federal Safety Appliance Act, said:

"Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of em-

ployees. Until Congress entered that field the States could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject. * * * For, as said in *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, 617: 'If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, *the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.* Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.'" (Italics ours.)

Southern Ry. Co. v. R. R. Commission, 236 U. S., 439, 446-7.

(c). "The conception of the operation at one and the same time of both the power of Congress and the power of the States over the matter of interstate commerce is incon-

ceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate."

N. Y. Central R. R. v. *Hudson County*, 227 U. S., 248, 264.

(d). Now that Congress has enacted that a common carrier by railroad, while engaged in interstate commerce, shall be liable to an employee for injuries sustained by him when employed by the railroad in such commerce, only in the event that such injuries occur through *negligence*, it follows that this employer in this case can not be compelled to make pecuniary contribution to Winfield solely on the theory that his employer was not negligent. For it is obvious that a state statute which undertakes to create a liability, utterly regardless of any question of negligence, is altogether at variance with the Federal statute upon the subject. To the view expressed by the Court of Appeals, that the two statutes do not cover the same field, since the Federal Act creates a cause of action only where there has been negligence, while the State Act undertakes to impose liability where there has been no negligence, the complete answer is that "it was the intention of Congress to base the action upon *negligence only*, and to *exclude* responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. (Italics ours.)

Seaboard Air Line v. *Horton*, 233 U. S., 492, 501.

(e). Where it was contended that a plaintiff, injured while employed by a railroad then engaged in interstate commerce, was entitled to recover under a statute of the State of Ohio,

this court, in reversing the Supreme Court of the State of Ohio, which had sustained the contention of the plaintiff, said: "A controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the State statute, *the defendant was entitled to disprove liability under the Ohio Act*, by showthat the injury had been inflicted while Slavin was employed in interstate business." (Italics ours.)

Toledo, St. L. & West R. R. Co. v. *Slavin*, 236 U. S., 454, 457.

(f). A railroad employee was shot while endeavoring to drive trespassers from an interstate train, his injuries concededly not having been caused by negligence on the part of the railroad; wherefore, he presented his claim under the Workmen's Compensation Act of California, but "a dismissal of petitioner's application was ordered because it appeared, in the opinion of the commission, that the employment in which the watchman was engaged at the moment of the accident had to do with interstate commerce, and therefore his claim for compensation did not fall within the jurisdiction of the state board." On appeal it was urged that, in the absence of any claim of negligence, compensation under the State Act could be enforced, but the court on February 16th, 1915, after reviewing the decisions of this court in the cases of *Horton*, *Taylor* and *Vreeland*, hereinbefore cited, rendered a decision which is stated in the head note as follows: "The Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St., 1913, §§ 8657-8665]) fixing the responsibility of carriers engaged in interstate commerce for injuries to their employees while employed in

such commerce, resulting from negligence of the carrier or its servants, governs the entire liability of the carrier for such injuries, and is exclusive of state legislation on that subject, so that an employee engaged in interstate commerce cannot recover under a state Workmen's Compensation Act for an injury received in his employment, but not caused by the negligence of the carrier or its employees."

Smith v. *Industrial Accident Commission*, 147 Pac. Rep., 600.

(g). In reversing the decision of the Illinois court of intermediate appeal in *Staley* v. *Illinois Central R. R. Co.* (reported below in 186 Ill. App., 593, and doubted by Presiding Justice SMITH in his dissenting opinion at the Appellate Division in this case [Transcript, p. 26]), the Supreme Court of Illinois (109 North Eastern Reporter, 342), held that for the death of a railroad employee, while engaged in interstate commerce, there could be no recovery under the Illinois Compensation Act, even upon the theory that the Illinois Act might be regarded as supplementing or piecing out the provisions of the Federal Act. Among other things, the court said: "It is first necessary to consider and decide the question whether there can be a recovery in this cause under the Illinois Workmen's Compensation Act, so called, or whether the cause is comprehended within the meaning and scope of the Federal Employers' Liability Act and recovery can only be had under this last named law. If the position of defendant-in-error on this point, raised by filing cross-errors in this court, is sustained, it will be unnecessary to consider the other questions involved. Counsel for defendant-in-error insist in their amended answer that plaintiff-in-error's intestate was engaged,

at the time of his fatal injury, in interstate commerce and that therefore the Federal Employers' Liability Act controls, superseding all state laws on the subject. * * * The question in the case before us is not whether the deceased was engaged in interstate commerce at the time of the accident, for that is conceded. Neither is it necessarily the question whether the Workmen's Compensation Act affected directly and substantially an instrument of commerce. The argument of counsel for plaintiff-in-error that the Workmen's Compensation Act affects the employee 'solely as a member of society and not as an instrument of society,' and is therefore within the police power of the state, can not be sustained if Congress has by legislation acted on the 'subject matter' or the 'particular subject' or in the 'same field' (as those terms are understood in the decisions) as that covered by the Illinois Workmen's Compensation Act. Counsel in their briefs state that the particular question here presented has never been considered or decided by any court, either State or Federal. We have been unable to find any decision of a court of final review where such question has been under consideration. We have therefore deemed it proper to discuss at some length the authorities that bear, directly or indirectly, on the point to be decided." After reviewing in detail the decisions of this court in the following cases previously cited in this brief, viz.: those of *Vreeland*, *Hesterly*, *Zachary*, *Horton* and *Hayes*, the court continued: "Under those decisions the conclusion is inevitable that in a suit to recover for an injury on a railroad occurring while the employer and employee were engaged in interstate commerce, the Federal Employers' Liability Act, alone, would control and

could not be pieced out or supplemented by any state statute. The decedent having been engaged at the time of his death, in interstate commerce, the recovery must be had, if at all, under and subject to the provisions of the Federal Employers' Liability Act."

(b). That this court may have before it the latest instance of the conflict between the Federal Employers' Liability Act and a State compensation law, attention is directed to the fact that, on January 6, 1916, the New Jersey Court of Errors and Appeals, in the case of *Amy L. Winfield against The Erie R. R. Co.* (not yet reported), in a short opinion by Chief Justice Gummere, citing no cases, held that, in the absence of negligence, a recovery under the New Jersey Compensation Law may be sustained for the death of a railroad employee killed while engaged in interstate commerce. The result is that, to date, the rule for which this plaintiff-in-error contends has been sanctioned in the States of California and Illinois, but disapproved in the States of New York and New Jersey.

(c). To conclude this branch of the argument, we may properly recur to the Federal Employers' Liability Act, to determine just what matters it regulates, and thereupon compare the subject matter regulated by that Act with the subject matter of the New York Compensation Law. Thus we should obtain light upon the question — Do they occupy the same field? What the Federal Act regulates, according to the plain terms of section 1 thereof, is the liability "in damages to any person suffering injury" by the negligence defined. Is this a regulation of non-negligent liability also? The answer is found in the opinion of the Chief

Justice in St. Louis, I. M. & S. Ry. Co. v. McWhirter (229 U. S., 265), where a state court was reversed upon the ground that no negligence had been proven. He declared that there were two matters "Federal in character," namely, the right of the plaintiff to recover and "the converse, that is to say the right of the defendant to be shielded from responsibility under that statute [the Federal Employers' Liability Law] because, when properly applied, no liability on his part from the statute would result." (P. 275.) The State theory that Congress has regulated only the negligent, and that the State by way of supplement may regulate the non-negligent, injuries incurred by employees while employed in interstate commerce cannot prevail if, as this court has said in the case last cited, there exists a right of the railroad "to be shielded from responsibility under the statute" when no negligence of the railroad is proven. The Federal Act is thus shown to be as potent in defense as in liability, and to regulate the non-negligent as well by necessary intendment as the negligent injuries. The New York Act is, therefore, an attempt to occupy the same field as the act of Congress by giving for a non-negligent injury compensation which by the act of Congress is denied.

4. *The result in the state courts narrows the scope of the Federal Act.*

(a). The Federal Employers' Liability Act regulates the legal responsibility of common carriers by railroad for injuries to or death of their employees; defines and limits their *respective* rights when both are engaged in interstate commerce; and occupies the entire field of liability. Whether the servant has a remedy under the Federal Act or not is imma-

terial in this case. The courts below have held that the State has the power to fill what it may regard as an hiatus left by Congress. In other words, the employee must have his remedy, even though engaged in interstate commerce, and if Congress does not afford it to him, then it must be supplied by the state.

(b). There is a large class of employees who negligently contribute to their own injury, and who can only recover *partial* damages under the Federal Act. Would it be logical to suggest that they should be given compensation under the state act for such part of their damages as may have been caused by their contributory negligence? Certain it is that employees who are entitled to compensation receive the full amount thereof, regardless of their negligence. Clearly, in the opinion of the Court of Appeals, the Federal Employers' Liability Act applies to an employee engaged in interstate commerce at one moment, while the state compensation act applies at another. It is conceivable that two employees, both engaged exclusively in interstate commerce, may be injured in the same accident, of whom one would be entitled to recover damages under the Federal Act and the other to compensation under the state law. For instance, a collision may be brought about by the sole negligence of a train conductor. The negligent conductor and a brakeman may be injured. The brakeman would have a right, under the Federal Employers' Liability Act, to recover damages because of the negligence of the conductor; the conductor, in turn, not having a right of recovery under the Federal Act, would receive compensation under the state law!

(c). Under section 12 of the Workmen's Compensation Law, the interval during which, after an injury, compensation will not be paid, is two weeks, commonly called "the waiting period." If Congress had passed a Federal compensation act, with a "waiting period" of one month, could it possibly be held that a state law with a "waiting period" of two weeks would be applicable in cases of interstate railroad employees who had sustained disability of over two weeks and less than one month?

(d). The employer has, under the Federal Employers' Liability Act, a most important right — that of defeating a recovery in an action brought by an employee in interstate commerce where an injury occurs without negligence. If the courts below are correct, the State of New York has effectually annulled such right, by saying: "The Federal Act is good as far as it goes, but it does not go far enough; wherefore the supplementary provisions of the Workmen's Compensation Law are enacted for the benefit of those to whom it may be a boon."

(e). A cause of action under the Federal Act must, by the terms of section 6 thereof, be commenced within two years after it shall have accrued. But if the limitation of time within which a proceeding under a state compensation law must be commenced is greater, then, under the decisions below, what shall prevent the commencement of a proceeding under a state compensation law, after the expiration of two years from the injury or death of a railroad employee, engaged in interstate commerce?

(f). To the assertion in the opinion of the Court of Appeals (Transcript, p. 46) that "the present workmen's compensation law was deemed a necessary exercise by the state under modern industrial conditions of its police power," the sufficient and unanswerable reply is: "The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; * * * when Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. * * * The legislation is not saved by calling it an exercise of the police power."

Charleston & Car. R. R. v. *Varnville Co.*, 237 U. S., 597, 604.

(g). "The test, however," as this court has stated, "is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

Southern Ry. Co. v. R. R. Comm., Indiana, 236 U. S., 439, 448.

(h). The Court of Appeals has declared (Transcript, p. 46) that the compensation law does not impose any unreasonable condition upon interstate commerce, although, earlier in the opinion (Transcript, pp. 44-45) the law is said to contemplate that the expense incident to compensation of employees shall be charged upon the occupation. Since interstate transportation by common carriers is regulated by Congress which, through the Interstate Commerce Commission, competently establishes rates of transportation, it follows that the interstate carrier may not pass along to its

patrons the extra cost of securing compensation under the State law. Hence such added cost amounts, in effect, to a tax upon interstate transportation facilities and rates to a degree that constitutes a direct interference with the functions of Congress and of the Interstate Commerce Commission. For, without power to regulate the source or amount of earnings from interstate transportation, the State, by the compensation law, has assumed to compel an appropriation from such earnings. If, then, it is competent for the State of New York thus to place a burden upon interstate commerce, so also may other States, each in a different degree, although none of them has power to determine the rate of earnings from which the burden must be met. The inevitable consequence must be a disruption of the uniformity which it is the Federal policy to apply to interstate transportation and interstate rates. That the State law applies to employees outside the State has just been distinctly held by the New York Court of Appeals.

Matter of Post, New York Law Journal, Jan. 21, 1916.

5. *The reasoning of the Court of Appeals cannot be sustained.*

(a). No one can gainsay the accuracy of the statement, near the bottom of page 47 of the transcript, that "So far as accidents result to those engaged in interstate commerce, the whole subject is, when Congress assumes to deal with it, excluded from the operation of State regulation." The difficulty, however, is that the law, though stated correctly, has been applied most incorrectly in reaching the result below.

(b). So, too, if "the primary purposes of the act was to give compensation in those cases

where no claim of negligence on the part of the employer could reasonably be made" (Transcript, p. 45), is it quite logical to assert, at page 47 of the Transcript, that "The State in the Workmen's Compensation Law has assumed to deal with all industrial accidents whether they be the result of negligence or not"?

(c). The important and fundamental question is, What was the subject matter of the legislation known as the Federal Employers' Liability Act? Plainly it was liability for injury to or death of railroad employees while employed by a railroad then engaging in interstate commerce. It was wholly unnecessary for Congress to proclaim in so many words that the liability imposed by the Federal Act defined and limited the remedies which Congress then deemed it necessary, or desirable, to confer in cases of railroad employees injured or killed while engaging in interstate commerce; for such was the inevitable conclusion to be drawn under well-settled rules laid down in many familiar decisions of this court. Now, the generic subject involves the liability of the master for a servant's injury or death. Such injury or death may result from a variety of causes, and even from acts of negligence varying in degree, such as gross negligence or comparative negligence, or from no negligence at all. According to the reasoning below, any one of such causes may become the subject of State legislation, where interstate railroad employees are involved, on the theory that that particular portion of the generic subject has not yet become the subject of federal enactment.

(d). In the course of its discussion of the "subject matter" of the State Act, the learned

Court of Appeals, at pages 44-45 of the Transcript, argues at length that "The Workmen's Compensation Law is radically different in *principle*, *purpose*, *scope* and *method* from the Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents." But it is equally true of the Federal Act that, as this court has declared, "It introduced a new policy and quite radically changed the existing law."

Winfree v. *Nor. Pac. Ry. Co.*, 227 U. S., 296, 302.

(e). The Court of Appeals observes that "The principle underlying the State statute is that, as injuries to workmen are necessarily incident to the operation of certain hazardous occupations, the expense of compensating the employees for such injuries is properly chargeable upon the occupation." Yet Congress, in enacting the Federal Act, recognized that "injuries to workmen are necessarily incident to the operation of certain hazardous occupations," but determined, in its wisdom, that railroad employers should be liable to their interstate employees only in cases of injury or death resulting from negligence. As for the theory that the expense of compensation may be charged upon the business, it is obviously impossible to predetermine the character of the commerce in which railroad employees may be engaged when injured or killed, or to make any estimate of the pay roll of such employees as may in course of time be injured or killed without fault. Yet, under the authority conferred upon it by the State law, the New York Workmen's Compensation Commission has fixed the "State fund" premium at $14.85 per $100.00 of the annual pay roll, applicable to all employees of a railroad generally, irre-

spective of the positions filled by them or the varying hazards of their employment. The total compensation of *all employees* on railroads of the United States, with operating revenue above $100,000.00, during the fiscal year ended June 30, 1914, was $1,373,422,472.00. Should the several States of the Union enact compensation laws sanctioning schedules as exorbitant as that which obtains under the New York law, basing the premiums upon such a heavy percentage of the pay roll, it will be readily seen that the total cost to the railroads on such basis would approximate $203,935,226.00 for one year.

(f). The Court of Appeals further asserts that "The purpose of this act was to establish an insurance fund to which employers are required to contribute, out of which fund compensation to the workmen is paid and contribution to which by the employer relieves him of further liability." Now, it is too clear to require discussion that the real purpose of the act was to compensate for injury or death of employees, and that the insurance fund is only a means to that end. Indeed, four methods for securing payment are provided by the act, only one of which happens to be a so-called "State fund" insurance. Again, at page 49 of the Transcript, the opinion states: "The insurance fund created by the State statute is not for the benefit of those who are within the Federal statute * * * The contribution which the employer makes to the insurance fund under the State statute relieves him of liability to his employees in cases which are not within the Federal statute." To this the answer is twofold: (a). The pay-roll basis of contribution which the employer is required to make includes *all* employees, whether engaged in inter-

state or intrastate commerce; (b). Under section 53 of the Compensation Law, it is only where the employer adopts the "State fund" method of insurance, among the four methods provided, that the employer is absolutely relieved from further liability for compensation.

(g). It is true, as the Court of Appeals points out at page 31 of the Transcript, that "The scope of the act is much broader than the Federal Employers' Liability Act," but this constitutes a real conflict between the two enactments, for the State law is an attempt to enlarge the field of legislation which Congress has regarded as sufficient. Hence, it must necessarily be considered as either a supplement to the Federal Act or a plain amendment thereof by the enactment of additional provisions for compensation to interstate employees. Under either alternative the State legislation must be inoperative as to railroad employees injured or killed while engaging in interstate commerce, because of the very fact that Congress has manifested its purpose to control the subject.

Nor. Pac. Ry. Co. v. *State of Washington*, 222 U. S., 370, 379.

(h). True, also, is it that, as the opinion below states at page 45 of the Transcript, "The method by which compensation is given to the employee is different from the method by which redress may be secured in an action brought under the provisions of the Federal Employers' Liability Act." The method of payment, however, being matter of mere detail, is not important. Whether the payment be required to be made in a lump sum, or in installments, the employer is required to assume and bear the burden.

(i). Nor may the rights and liabilities of master and servant, mutually engaged in interstate commerce by railroad, competently become the subject of State regulation outside and beyond the field of negligence or other tort. Any such attempt by a State must run counter to this court's ruling in *Seaboard Air Line* v. *Horton* (233 U. S., 492, 502).

POINT III.

The Workmen's Compensation Act itself precludes an award in this case.

1. *Such are its terms.*

(a). By section 114 of the act, "the provisions of this chapter shall apply, to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability *or* method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce." That is to say, the act shall apply to:

(1) Employers and employees engaged solely in intrastate commerce; and

(2) Employers and employees engaged in interstate commerce, for whom Congress has established or may establish a rule of liability or method of compensation, provided, however, that it shall only apply in cases where the mutual connection of both employers and employees may and shall be clearly separable and distinguishable from interstate or foreign commerce.

(b). Attention is directed to the fact that, in the first line of section 114, as quoted in the opinion of the Court of Appeals, at page 48 of the Transcript, the word "not" erroneously appears, expressing a negative which does not occur in the text of the statute itself, as shown in appendix "A" hereto annexed. Of course, it is altogether certain that any attempted agreement between a railroad company and an interstate employee thereof to come under the provisions of the State Workmen's Compensation Act, would contravene the express provision of section 5 of the Federal Act which forbids "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act."

2. *So the cases hold.*

(a). Of section 114 of the Compensation Act the New York Court of Appeals has declared that "Its obvious purpose was to guard against a construction violative of the Constitution of the United States. * * * In other words, the Legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States."

Matter of Jensen v. *Southern Pacific Co.*, 215 N. Y., 514, 521-522.

(b.) That the State legislation has actually invaded a field already occupied by Congress is, of course, precisely what this plaintiff-in-error contends.

(c). Within the cases cited (*supra*) under Point II, it is clear that Congress has estab-

lished a rule of liability in this case, namely: a liability only where the employer or its servants shall have been *negligent*. In the *Horton* case, above cited, the Supreme Court of North Carolina had held that a State statute, which abrogated *entirely* the defense of assumed risks, was not superseded by the Federal Act which abolishes that defense only where the railroad has violated a *statutory* regulation. In other words, the State court had held that it was a *casus omissus*, which left room for the concurrent operation of the State statute, without coming in conflict with the terms of the Federal Act. But this court held otherwise, and declared that the result of the Federal Act was to leave open to the employer the common-law defense of assumption of risks, save where a Federal statutory regulation had been violated, saying: "The adoption of the opposite view would in effect leave the several State laws, and not the act of Congress, to control the subject matter."

Seaboard Air Line v. *Horton*, 233 U. S., 492, 507.

(d) The Federal Act and its amendment of 1910 provide for a liability in excess of that which existed at common law. To quote from the dissenting opinion in the Appellate Division (Transcript, p. 26): "Upon the principle of *expressio unius exclusio alterius* the Acts constitute a denial of liability except in the cases mentioned. In any event a rule of liability is established by Congress directly within the terms of section 114, and the work in which the claimant was engaged was not severable from interstate commerce. Section 114 seems to contemplate cases where Congress had legislated either as to a rule of liability *or*

as to a method of compensation. It seems to have been within the mind of the Legislature that Congress might hereafter pass a Workmen's Compensation Act. Having limited, however, the effect of this Compensation Act to cases in which either a method of compensation *or* a rule of liability had been established, the intent would seem clear to exclude all cases where the party was engaged in work not severable from interstate commerce, as long as the rule of liability of master to servant, where the work was performed in connection with interstate commerce, had already been prescribed by Congress."

(c). In a case which involved the construction of a provision of the voluntary Workmen's Compensation Act of Ohio, passed in 1913, the terms of which provision are practically identical with those of section 114 of the New York Workmen's Compensation Act, the very construction for which this brief contends was sustained by the District Court of the United States.

Connole v. *Norfolk & W. Ry. Co.*, 216 Fed., 823.

POINT IV.

The State Workmen's Compensation Act, which is compulsory in its terms, contravenes the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

POINT V.

Plaintiff-in-error has not waived its right to test the application of the Compensation Act to this case.

To avoid repetition of the argument in support of Point IV and Point V, this court is respectfully referred to the discussion, at length, under the correspondingly numbered points at pp. 14 and 35 of the brief filed by this plaintiff-in-error in *New York Central Railroad Company* v. *Sarah White* (No. 761), argued herewith.

CONCLUSION.

The order of the Appellate Division of the Supreme Court, entered upon the judgment of the Court of Appeals, should be reversed, and this cause should be remanded for further proceedings not inconsistent with the decision of this court.

Such a result will be in complete accord with this court's utterances on three distinct occasions:

> "By this Act Congress has undertaken to cover the subject of liability of railroad companies to their employees injured while engaged in interstate commerce."
>
> *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S., 59, 66.

> "It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence."
>
> *Seaboard Air Line* v. *Horton*, 233 U. S., 492, 501.

"At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source."

Atlantic Coast Line R. R. v. Burnette, 239 U. S., 199, 201.

All of which is respectfully submitted.

Dated January 31, 1916.

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APPENDIX "A."

New York Workmen's Compensation Law

[*Chapter* 816 *of the Laws of* 1913, *as re-enacted and amended by chapter* 41 *of the Laws of* 1914, *constituting chapter* 67 *of the Consolidated Laws, as amended by chapter* 316 *of the Laws of* 1914 *and by chapters* 167, 168, 615 *and* 674 *of the Laws of* 1915.]

Article 1. Short title, application, definitions (§§ 1-3).
2. Compensation (§§ 10-34).
3. Security for compensation (§§ 50-54).
4. State workmen's compensation commission (§§ 60-76).
5. State insurance fund (§§ 90-105).
6. Miscellaneous provisions (§§ 110-119).
7. Laws repealed; when to take effect (§§ 130-131).

ARTICLE 1

Short Title; Application; Definitions

Section 1. Short title.
2. Application.
3. Definitions.

Section 1. Short title.—This chapter shall be known as the "workmen's compensation law."

§ 2. Application.—Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including

work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction and operation of railways not included in group one.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purposes of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

Group 4. The operation, including construction and repair of car shops, machine shops, steam and power plants, not included in group three.

Group 5. The operation, including construction and repair, of telephone lines and wires for the purposes of the business of a telephone company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 6. The operation, including construction and repair, of telegraph lines and wires for the purposes of the business of a telegraph company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 7. Construction of telegraph and telephone lines not included in groups five and six.

Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company.

Group 9. Shipbuilding, including construction and repair in a ship-yard or elsewhere, not included in group eight.

Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of

grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.

Group 11. Dredging, subaqueous or caisson construction, and pile driving.

Group 12. Construction, installation or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines.

Group 13. Paving; sewer and subway construction, work under compressed air, excavation, tunneling and shaft sinking, well digging, laying and repair of underground pipes, cables and wires, not included in other groups.

Group 14. Lumbering; logging, river-driving, rafting, booming, saw mills, shingle mills, lath mills; manufacture of veneer and of excelsior; manufacture of staves, spokes, or headings.

Group 15. Pulp and paper mills.

Group 16. Manufacture of furniture, interior woodwork, organs, pianos, piano actions, canoes, small boats, coffins, wicker and rattan ware; upholstering; manufacture of mattresses or bed springs.

Group 17. Planing mills, sash and door factories, manufacture of wooden and corrugated paper boxes, cheese boxes, mouldings, window and door screens, window shades, carpet sweepers, wooden toys, articles and wares or baskets.

Group 18. Mining; reduction of ores and smelting; preparation of metals or minerals.

Group 19. Quarries; sand, shale, clay or gravel pits, lime kilns; manufacture of brick, tile, terra-cotta, fire-proofing, or paving blocks, manufacture of calcium carbide, cement, asphalt or paving material.

Group 20. Manufacture of glass, glass products, glassware, porcelain or pottery.

Group 21. Iron, steel or metal foundries; rolling mills; manufacture of castings, forgings, heavy engines, locomotives, machinery, safes, anchors, cables, rails, shafting, wires, tubing, pipes, sheet metal, boilers, furnaces, stoves, structural steel, iron or metal.

Group 22. Operation and repair of stationary engines and boilers, not included in other groups.

Group 23. Manufacture of small castings or forgings, metal wares, instruments, utensils and articles, hardware, nails, wire goods, screens, bolts, metal beds, sanitary, water, gas or electric fixtures, light machines, typewriters, cash registers, adding machines, carriage mountings, bicycles, metal toys, tools, cutlery, instruments, photographic cameras and supplies, sheet metal products, buttons.

Group 24. Manufacture of agricultural implements, threshing machines, traction engines, wagons, carriages, sleighs, vehicles, automobiles, motor trucks, toy wagons, sleighs or baby carriages.

Group 25. Manufacture of explosives and dangerous chemicals, corrosive acids or salts, ammonia, gasoline, petroleum, petroleum products, celluloid, gas, charcoal, artificial ice, gun powder or ammunition.

Group 26. Manufacture of paint, color, varnish, oil, japans, turpentine, printing ink, printers' rollers, tar, tarred, pitched or asphalted paper.

Group 27. Distilleries, breweries; manufacture of spirituous or malt liquors, alcohol, wine, mineral water or soda waters.

Group 28. Manufacture of drugs and chemicals, not specified in group twenty-five, medicines, dyes, extracts, pharmaceutical or toilet preparations, soaps, candles, perfumes, non-corrosive acids or

chemical preparations, fertilizers, including garbage disposal plants; shoe blacking or polish.

Group 29. Milling; manufacture of cereals or cattle foods, warehousing; storage; operation of grain elevators.

Group 30. Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue.

Group 31. Tanneries.

Group 32. Manufacture of leather goods and products, belting, saddlery, harness, trunks, valises, boots, shoes, gloves, umbrellas, rubber goods, rubber shoes, tubing, tires or hose.

Group 33. Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries.

Group 34. Bakeries, including manufacture of crackers and biscuits, manufacture of confectionery, spices or condiments.

Group 35. Manufacture of tobacco, cigars, cigarettes or tobacco products.

Group 36. Manufacture of cordage, ropes, fibre, brooms or brushes; manilla or hemp products.

Group 37. Flax mills; manufacture of textiles or fabrics, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt.

Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes.

Group 39. Power laundries; dyeing, cleaning or bleaching.

Group 40. Printing, photo-engraving, stereotyping, electrotyping, lithographing, embossing; manufacture of stationery, paper, cardboard boxes, bags, or wall-paper; and book-binding.

Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules.

Group 42. Stone cutting or dressing; marble works; manufacture of artificial stone; steel building and bridge construction; installation of elevators, fire escapes, boilers, engines or heavy machinery; brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry; painting, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings and bridges; plumbing, sanitary or heating engineering; installation and covering of pipes or boilers.

§ 3. Definitions.—As used in this chapter, 1. "Hazardous employment" means a work or occupation described in section two of this chapter.

2. "Commission" means the state workmen's compensation commission, as constituted by this chapter.

3. "Employer," except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof. [*Subd. 3 am'd by L.* 1914, *ch.* 316.]

4. "Employee" means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.

5. "Employment" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain.

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

7. "Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

8. "Death" when mentioned as a basis for the right to compensation means only death resulting from such injury.

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.

10. "State fund" means the state insurance fund provided for in article five of this chapter.

11. "Child" shall include a posthumous child and a child legally adopted prior to the injury of the employee.

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty.

ARTICLE 2

Compensation

Section 10. Liability for compensation.
11. Alternative remedy.
12. Compensation not allowed for first two weeks.
13. Treatment and care of injured employees.

Section 14. Weekly wages basis of compensation.
15. Schedule in case of disability.
16. Death benefits.
17. Aliens.
18. Notice of injury.
19. Medical examination.
20. Determination of claims for compensation.
21. Presumptions.
22. Modification of award.
23. Appeals from the commission.
24. Costs and fees.
25. Compensation, how payable.
26. Enforcement of payment in default.
27. Depositing future payments.
28. Limitation of right to compensation.
29. Subrogation to remedies of employee.
30. Revenues or benefits from other sources not to affect compensation.
31. Agreement for contribution by employee void.
32. Waiver agreements void.
33. Assignments; exemptions.
34. Preferences.

§ 10. Liability for compensation.—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another,

or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter.

§ 11. Alternative remedy.— The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. [*Section 11 am'd by L. 1914, ch. 316.*]

§ 12. Compensation not allowed for first two weeks.— No compensation shall be allowed for the first fourteen days of disability, except the benefits provided for in section thirteen of this chapter.

§ 13. Treatment and care of injured employees. — The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fail to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected

to do so. All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

§ 14. Weekly wages basis of compensation.—Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality,

shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

5. If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wages.

§ 15. Schedule in case of disability.— The following schedule of compensation is hereby established:

1. Total permanent disability. In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of a first finger, commonly called index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third finger. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye.

Amputations. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen of this chapter.

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest.

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability. [*Subd.* 6 *am'd by L.* 1915, ch. 615.]

§ 16. Death benefits.— If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses not exceeding one hundred dollars;

2. If there be a surviving wife (or dependent husband) and no child of the *deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average

* So in original.

wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. [*Subd.* 2 *am'd by L.* 1914, *ch.* 316.]

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. But in no case shall the aggregate

amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

§ 17. Aliens.—Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount as provided for residents, except that the commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission.

§ 18. Notice of injury.— Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, and contain the name and address of the employee and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf or, in case of death, by any one or more of his dependents or by a person on their behalf. It shall be given to the commission by sending it by mail, by registered letter, addressed to the commission at its office. It shall

be given to the employer by delivering it to him or sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership then such notice may be so given to any one of the partners, and if the employer be a corporation, then such notice may be given to any agent or officer thereof upon whom legal process may be served, or any agent in charge of the business in the place where the injury occurred. The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter.

§ 19. Medical examination.—An employee injured claiming or entitled to compensation under this chapter shall, if requested by the commission, submit himself for medical examination at a time, and from time to time, at a place reasonably convenient for the employee, and as may be provided by the rules of the commission. If the employee or the insurance carrier request he shall be entitled to have a physician or physicians of his own selection to be paid by him present to participate in such examination. If an employee refuse to submit himself to examination, his right to prosecute any proceeding under this chapter shall be suspended, and no compensation shall be payable, for the period of such refusal.

§ 20. Determination of claims for compensation.—At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the com-

mission as provided by this section, the claim may be presented to the commission. The commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The commission shall make or cause to be made such investigations as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission, together with a statement of its conclusions of fact and rulings of law. The commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the commission or a person specially deputized by the commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the commission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The commission shall examine such report and ap-

prove the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the employer under this section, the commission may impose a penalty of not more than ten per centum of the award. [*As am'd by L.* 1915, *ch.* 167.]

§ 20-a. Payment of moneys in advance of award by commission.—Any employer shall upon the making of the agreement provided for in section twenty advance to any injured employee or to the principal dependent of a deceased employee, the payment or payments provided for in the agreement, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance and the sum stated on its face shall be returned to said employer as provided in section twenty-five.

Prior to the making of said agreement or in the event of no agreement, any employer may at his option advance to any injured employee or to the principal dependent of a deceased employee any sum of money, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance. Should any agreement or award be made the sum so stated on the face of the receipt shall be credited to the payment under the award or agreement and shall

be repaid as hereinbefore provided. Any money so advanced shall be at the employer's risk. [*Added by L.* 1915, *ch.* 168.]

§ 21. Presumptions.— In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

§ 22. Modification of award.— Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid.

§ 23. Appeals from the commission.— An award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the appellate division of the supreme court of the third department. The commission may also, in its discretion, where the claim for compensation was not made against the state fund, on the application of either party, certify to such appellate division of the supreme court, ques-

tions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The commission shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the commission thereon. An appeal may also be taken to the court of appeals in all cases where such an appeal would lie from a decision of an appellate division, in the same manner and subject to the same limitations as is now provided in civil actions. Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon the final determination of such an appeal, the commission shall make an award or decision in accordance therewith.

§ 24. Costs and fees.— If the commission or the court before which any proceedings for compensation or concerning an award of compensation have been brought, under this chapter, determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceeding upon the party who has so brought them. Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission.

§ 25. Compensation, how payable.— Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may

deem advisable. The state or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee or, in case of death, his dependents, provided the same shall be in the interest of justice. [*As am'd by L.* 1915, *ch.* 167.]

§ 26. Enforcement of payment in default.— If payment of compensation, or an instalment thereof, due under the terms of an award, be not made by the employer within ten days after the same is due, the insurance carrier shall be liable therefor and if not paid within ten days after demand by the injured employee or in case of death his dependents or by the commission, the amount of such payment shall constitute a liquidated claim for damages against the self-insurer or insurance corporation, which with an added penalty of fifty per centum may be recovered in an action to be instituted by the commission in the name of the people of the state. An employer who negligently or intentionally defaults in payment of compensation in the first instance under this chapter shall be liable to a penalty of not more than ten per centum of the amount of such compensation, notwithstanding the fact that the insurance corporation or state fund subsequently pays the compensation as provided in this section. If such default be made in the payment of an instalment of compensation and the whole amount of such compensation be not due, the

commission may, if the present value of such compensation be computable, declare the whole amount thereof due, and recover the amount thereof with the added penalties, as provided by this section. Any such action may be compromised by the commission or may be prosecuted to final judgment as, in the discretion of the commission, may best serve the interests of the persons entitled to receive the compenation or the benefits. Compensation recovered under this section shall be disbursed by the commission to the person entitled thereto in accordance with the award. A penalty recovered pursuant to this section shall be paid into the state treasury, and be applicable to the expenses of the commission. [*As am'd by L.* 1915, *ch.* 167.]

§ 27. Depositing future payments.—If an award under this chapter requires payment of compensation by an employer or an insurance corporation in periodical payments, and the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies, the commission may, in its discretion, at any time, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer or insurance corporation shall be discharged from any further liability under such award and payment of the same shall be assumed by the state fund.

§ 28. Limitation of right to compensation.—The right to claim compensation under this chapter shall be forever barred unless within one year after the injury or if death result therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission.

§ 29. Subrogation to remedies of employees.—If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents,

shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same.

§ 30. Revenues or benefits from other sources not to affect compensation.— No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system which is not sustained in whole or in part by the contributions of the employee, may be applied toward the payment of the death benefit provided by this chapter. [*Section* 30 *am'd by L.* 1914, *ch.* 316.]

§ 31. Agreement for contribution by employee void.— No agreement by an employee to pay any portion of the premium paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor.

§ 32. Waiver agreements void.— No agreement by an employee to waive his right to compensation under this chapter shall be valid.

§ 33. Assignments; exemptions.— Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents.

§ 34. Preferences.— The right of compensation granted by this chapter shall have the same preference or lien without limit of amount against the assets of the employer as is now or hereafter may be allowed by law for a claim for unpaid wages for labor.

ARTICLE 3

Security for Compensation

Section 50. Security for payment of compensation.
51. Posting of notice regarding compensation.
52. Effect of failure to secure compensation.
53. Release from all liability.
54. The insurance contract.

§ 50. Security for payment of compensation.—An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission.

The commission may, in its discretion, for good cause shown, remit any such penalty, provided the employer in default secure compensation as provided in this section. [*Subd.* 3 *am'd by L.* 1914, *ch.* 316.]

§ 51. Posting of notice regarding compensation. — Every employer who has complied with section

fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the commission, stating the fact that he has complied with all the rules and regulations of the commission and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter.

§ 52. Effect of failure to secure compensation.— Failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

§ 53. Release from all liability.— An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

§ 54. The insurance contract.— 1. Right of recourse to the insurance carrier. Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this state shall contain a provision setting forth the right of the commission to enforce in the name of the people of the state of New York for the benefit of the person entitled to the compensation insured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability of the insurance carrier in whole or in part for the payment of such com-

pensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid.

2. Knowledge and jurisdiction of the employer extended to cover the insurance carrier. Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.

3. Insolvency of employer does not release the insurance carrier. Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy.

4. Limitation of indemnity agreements. Every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an employee by accidental means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided for by this chapter.

5. Cancellation of insurance contracts. No contract of insurance issued by a stock company or mutual association against liability arising under

this chapter shall be cancelled within the time limited in such contract for its expiration until at least ten days after notice of intention to cancel such contract, on a date specified in such notice, shall be filed in the office of the commission and also served on the employer. Such notice shall be served on the employer by delivering it to him or by sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership, then such notice may be so given to any one of the partners, and if the employer be a corporation then the notice may be given to any agent or officer of the corporation upon whom legal process may be served.

ARTICLE 4

State Workmen's Compensation Commission

Section 60. State workmen's compensation commission.*

61. Secretary, deputies and other employees.*

62. Salaries and expenses.

63. Office.

64. Sessions of commission.

65. Powers of individual commissioners and deputy commissioners.

66. Powers and duties of secretary.

67. Rules.

68. Technical rules of evidence or procedure not required.

69. Issue of subpoena; penalty for failure to obey.

70. Recalcitrant witnesses punishable as for contempt.

71. Fees and mileage of witnesses.

* §§ 60, 61 of the Workmen's Compensation Law were repealed, and the functions of the Workmen's Compensation Commission transferred to the newly created Industrial Commission by L. 1915, ch. 674, §§ 2-8.

Section 72. Depositions.
73. Transcript of stenographer's minutes; effect as evidence.
74. Jurisdiction of commission to be continuing.
75. Report of commission.
76. Commission to furnish blank forms.

§ 62. Expenses.—The commission may make the necessary expenditure to obtain statistical and other information to establish classifications of employments with respect to hazards and risks. The expenses of the commission, including the premiums to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers signed by at least two commissioners. [*As am'd by L.* 1915, *ch.* 674.]

§ 63. Office.—The commission shall keep and maintain its principal office in the city of Albany, in rooms in the capitol assigned by the trustees of public buildings. The office shall be supplied with necessary office furniture, supplies, books, maps, stationery, telephone connections and other necessary appliances, at the expense of the state, payable in the same manner as other expenses of the commission.

§ 64. Sessions of commission.—The commission shall be in continuous session and open for the transaction of business during all business hours of every day excepting Sundays and legal holidays. All sessions shall be open to the public and may be adjourned, upon entry thereof in its records, without further notice. Whenever convenience of parties will be promoted or delay and expense prevented, the commission may hold sessions in cities other than the city of Albany. A party may appear before such commission and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record, and the records shall contain a record of each case considered, and

the award, decision or order made with respect thereto, and all voting shall be by the calling of each commissioner's name by the secretary and each vote shall be recorded as cast. A majority of the commission shall constitute a quorum. A vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the full commission so long as a majority remains.

§ 65. Powers of individual commissioners and deputy commissioners.—Any investigation, inquiry or hearing which the commission is authorized to hold or undertake may be held or taken by or before any commissioner or deputy commissioner, and the award, decision or order of a commissioner or deputy commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be deemed to be the award, decision or order of the commission. Each commissioner and deputy shall, for the purposes of this chapter, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. The commission may authorize any deputy to conduct any such investigation, inquiry or hearing, in which case he shall have the power of a commissioner in respect thereof.

§ 66. Powers and duties of secretary.—The secretary of the commission shall:

1. Maintain a full and true record of all proceedings of the commission, of all documents or papers ordered filed by the commission, of decisions or orders made by a commissioner or deputy commissioner, and of all decisions or orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office;

2. Have power to administer oaths in all parts of the State, so far as the exercise of such power

is properly incident to the performance of his duty or that of the commission;

3. Designate, from time to time, with the approval of the commission, one of the clerks appointed by the commission to exercise the powers and duties of the secretary during his absence;

4. Under the direction of the commission, have general charge of its office, superintend its clerical business, and perform such other duties as the commission may prescribe.

§ 67. Rules.—The commission shall adopt reasonable rules, not inconsistent with this chapter, regulating and providing for

1. The kind and character of notices, and the service thereof, in case of accident and injury to employees;

2. The nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to compensation;

3. The forms of application for those claiming to be entitled to compensation;

4. The method of making investigations, physical examinations and inspections;

5. The time within which adjudications and awards shall be made;

6. The conduct of hearings, investigations and inquiries;

7. The giving of undertakings by all subordinates who are empowered to receive and disburse moneys, to be approved by the attorney-general as to form and by the comptroller as to sufficiency;

8. Carrying into effect the provisions of this chapter;

9. The collection, maintenance and disbursement of the state insurance fund.

§ 68. Technical rules of evidence or procedure not required.—The commission or a commissioner or deputy commissioner in making an investiga-

tion or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

§ 69. Issue of subpoena; penalty for failure to obey.— A subpoena shall be signed and issued by a commissioner, a deputy commissioner or by the secretary of the commission and may be served by any person of full age in the same manner as a subpoena issued out of a court of record. If a person fail, without reasonable cause, to attend in obedience to a subpoena, or to be sworn or examined or answer a question or produce a book or paper, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor.

§ 70. Recalcitrant witnesses punishable as for contempt.— If a person in attendance before the commission or a commissioner or deputy commissioner refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question or to produce a book or paper, when ordered so to do by the commission or a commissioner or deputy commissioner, the commission may apply to a justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail. Upon the return of such order the justice shall examine under oath such person and give him an opportunity to be heard; and if the justice determine that he has refused without reasonable cause or legal excuse to be examined or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forth-

with, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

§ 71. Fees and mileage of witnesses.— Each witness who appears in obedience to a subpoena before the commission or a commissioner or deputy commissioner, or person employed by the commission to obtain the required information, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in the supreme court, which shall be audited and paid from the state treasury in the same manner as other expenses of the commission. A witness subpoenaed at the instance of a party other than the commission, a commissioner, deputy commissioner or person acting under the authority of the commission shall be entitled to fees or compensation from the state treasury, if the commission certify that his testimony was material to the matter investigated, but not otherwise.

§ 72. Depositions.— The commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court.

§ 73. Transcript of stenographer's minutes; effect as evidence.— A transcribed copy of the testimony, evidence and procedure or of a specific part thereof, or of the testimony of a particular witness or of a specific part thereof, on any investigation, by a stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript thereof and to have been carefully compared by him with his original notes, may be received in evidence by the commission with the same effect as if such stenographer were present and testified to the facts so certified, and a copy of such transcript shall be furnished on demand to any party upon payment of the fee pro-

vided for a transcript of similar minutes in the supreme court.

§ 74. Jurisdiction of commission to be continuing.—The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just.

§ 75. Report of commission.—Annually on or before the first day of February, the commission shall make a report to the legislature, which shall include a statement of the number of awards made by it and the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the expenses of the commission, the condition of the state insurance fund, together with any other matter which the commission deems proper to report to the legislature, including any recommendations it may desire to make.

§ 76. Commission to furnish blank forms.—The commission shall prepare and cause to be distributed so that the same may be readily available blank forms of application for compensation, notice to employers, proofs of injury or death, of medical or other attendance or treatment, of employment and wage earnings, and for such other purposes as may be required. Insured employers shall constantly keep on hand a sufficient supply of such blanks.

ARTICLE 5

State Insurance Fund

Section 90. Creation of state fund.
91. State treasurer custodian of fund.
92. Surplus and reserve.
93. Investment of surplus or reserve.
94. Administration expense.
95. Classification of risks and adjustment of premiums.
96. Associations for accident prevention.

Section 97. Requirements in classifying employment and fixing and adjusting premium rates.
98. Time of payment of premiums.
99. Action for collection in case of default.
100. Withdrawal from fund.
101. Audit of payrolls.
102. Falsification of payroll.
103. Wilful misrepresentation.
104. Inspections.
105. Disclosures prohibited.

§ 90. Creation of state fund.— There is hereby created a fund to be known as "the state insurance fund," for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter.

§ 91. State treasurer custodian of fund.— The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers authorized by the commission and signed by any two members thereof. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor and with sureties approved by the state comptroller conditioned for the faithful performance of his duty as custodian of the state fund. The state treasurer may deposit any portion of the

state fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

§ 92. Surplus and reserve.— Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the commission for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the commission such surplus shall be sufficiently large to cover the catastrophe hazard. The commission shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity.

§ 93. Investment of surplus or reserve.— The commission may, pursuant to a resolution of the commission approved by the comptroller, invest any of the surplus or reserve funds belonging to the state insurance fund in the same securities and investments authorized for investment by savings banks. All such securities or evidences of indebtedness shall be placed in the hands of the state treasurer who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all vouchers drawn on the state insurance fund for the making of such investments when signed by two members of the commission, upon delivery of such securities or evidences of indebtedness to him, when there is attached to such vouchers a certified copy of the resolution of the commission authorizing the investment. The commission may, upon like resolution approved by the comptroller, sell any of such securities.

§ 94. Administration expense.— The entire expense of administering the state insurance fund shall be paid in the first instance by the state, out of moneys appropriated therefor. In the month of January, nineteen hundred and eighteen, and annually thereafter in such month, the commission shall ascertain the just amount incurred by the commission during the preceding calendar year, in the administration of the state insurance fund exclusive of the expense for the examination, determination and payment of claims, and shall refund such amount to the state treasury. If there be employees of the commission other than the commissioners themselves and the secretary whose time is devoted partly to the general work of the commission and partly to the work of the state insurance fund, and in case there is other expense which is incurred jointly on behalf of the general work of the commission and the state insurance fund, an equitable apportionment of the expense shall be made for such purpose and the part thereof which is applicable to the state insurance fund shall be chargeable thereto. As soon as practicable after December thirty-one, nineteen hundred and seventeen, and annually thereafter, the commission shall calculate the total administrative expense incurred during the preceding calendar year in connection with the examination, determination and payment of claims and the percentage which this expense bore to the total compensation payments made during that year. The percentage so calculated and determined shall be assessed against the insurance carriers including the state fund as an addition to the payments required from them in the settlement of claims during the year immediately following, and the amounts so secured shall be transferred to the state treasury to reimburse it for this portion of the expense of administering this chapter.

§ 95. Classification of risks and adjustment of premiums.—Employments coming under the provisions of this chapter shall be divided for the purposes of the state fund, into the groups set forth in section two of this chapter. Separate accounts shall be kept of the amounts collected and expended in respect to each such group for convenience in determining equitable rates; but for the purpose of paying compensation the state fund shall be deemed one and indivisible. The commission shall have power to rearrange any of the groups set forth in section two by withdrawing any employment embraced in it and transferring it wholly or in part to any other group, and from such employments to set up new groups at its discretion. The commission shall determine the hazards of the different classes composing each group and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

§ 96. Associations for accident prevention.—The employers in any of the groups described in section two or established by the commission may with the approval of the commission form themselves into an association for accident prevention, and may make rules for that purpose. If the commission is of the opinion that an association so formed sufficiently represents the employers in such group, it may approve such rules, and when so approved and approved by the industrial board of the labor department they shall be binding on all employers in such group. If such an approved association appoint an inspector or expert for the purpose of accident prevention, the commission

may at its discretion provide in whole or in part for the payment of the remuneration and expenses of such inspector or expert, such payment to be charged in the accounting to such group. Every such approved association may make recommendations to the commission concerning the fixing of premiums for classes of hazards, and for individual risks within such group.

§ 97. Requirements in classifying employment and fixing and adjusting premium rates.— The following requirements shall be observed in classifying employments and fixing and adjusting premium rates:

1. The commission shall keep an accurate account of the money paid in premiums by each of the several classes of employments or industries, and the disbursements on account of injuries and death of employees thereof, including the setting up of reserves adequate to meet anticipated losses and to carry the claims to maturity, and also, on account of the money received from each individual employer and the amount disbursed from the state insurance fund on account of injuries and death of the employees of such employer, including the reserves so set up;

2. On January first, nineteen hundred and fifteen, and every fifth year thereafter, and at such other times as the commission, in its discretion, may determine, a readjustment of the rate shall be made for each of the several groups of employment or industries and of each hazard class therein, which, in the judgment of the commission, shall have developed an average loss ratio, in accordance with the experience of the commission in the administration of the law as shown by the accounts kept as provided herein;

3. If any such accounting show an aggregate balance (deemed by the commission to be safely and properly divisible) remaining to the credit of

any class of employment or industry, after the amount required shall have been credited to the surplus and reserve funds and after the payment of all awards for injury or death lawfully chargeable against the same, the commission may in its discretion credit to each individual member of such group, who shall have been a subscriber to the state insurance fund for a period of six months or more prior to the time of such readjustment, and whose premium or premiums exceed the amount of the disbursements from the fund on account of injuries or death of his employees during such period, on the instalment or instalments of premiums next due from him such proportion of such balance as the amount of his prior paid premiums sustains to the whole amount of such premiums paid by the group to which he belongs since the last readjustment of rates;

4. If the amount of premiums collected from any employer at the beginning of any period of six months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such six months, and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and, if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments, at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such six months, such employer shall immediately upon being advised of the true amount

of such premium due forthwith pay to the treasurer of the state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such six months' period.

§ 98. Time of payment of premiums.— Except as otherwise provided in this chapter, all premiums shall be paid by every employer into the state insurance fund on or before July first, nineteen hundred and fourteen, and semi-annually thereafter, or at such other time or times as may be prescribed by the commission. The commission shall mail a receipt for the same to the employer and place the same to the credit of the state insurance fund in the custody of the state treasurer.

§ 99. Action for collection in case of default.— If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the people of the state of New York, and it shall be the duty of the commission on the first Monday of each month after July first, nineteen hundred and fourteen, to certify to the attorney-general of the state the names and residences, or places of business, of all employers known to the commission to be in default for such payment or payments for a longer period than five days and the amount due from such employer, and it shall then be the duty of the attorney-general forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the state insurance fund.

§ 100. Withdrawal from fund.— Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his insurance contract for cancellation, provided he is not in arrears for premiums due the fund and has given to the commission written notice of his intention to withdraw within thirty days before the expiration of the period for which he has elected to insure in the fund; provided that in case any employer so withdraws, his liability to assessments shall, notwithstanding such withdrawal, continue for one year after date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal.

§ 101. Audit of payrolls.— Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish to the commission, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the commission shall require to verify the number of employees and the amount of the payroll.

§ 102. Falsification of payroll.— An employer who shall wilfully misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund is to be based shall be liable to the state in ten times the amount of the difference between the premiums paid and the amount the employer should have paid had his payroll been correctly computed and the liability to the state under this section shall be enforced in a civil action in the name of the state insurance fund, and any amount so collected shall become a part of such fund.

§ 103. Wilful misrepresentation.— Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order

to obtain payment out of such fund, shall be guilty of a misdemeanor.

§ 104. Inspections.— The commission shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the commission shall have free access to such premises during regular working hours.

§ 105. Disclosures prohibited.— Information acquired by the commission or its officers or employees from employers or employees pursuant to this chapter shall not be opened to public inspection, and any officer or employee of the commission who, without authority of the commission or pursuant to its rules or as otherwise required by law shall disclose the same shall be guilty of a misdemeanor.

ARTICLE 6

Miscellaneous Provisions

Section 110. Penalties applicable to expense of commission.
111. Record and report of injuries by employers.
112. Information to be furnished by employer.
113. Inspection of records of employers.
114. Interstate commerce.
115. Penalties for false representations.
116. Limitation of time.
117. Duties of commissioner of labor.
118. Unconstitutional provisions.
119. Actions or causes of action pending.

§ 110. Penalties applicable to expenses of commission.— All penalties imposed by this chapter shall be applicable to the expenses of the commission. When collected by the commission such penalties shall be paid into the state treasury and be thereafter appropriated by the legislature for the purposes prescribed by this section.

§ 111. Record and report of injuries by employers.—Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing by the employer to the commission upon blanks to be procured from the commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the commission. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

§ 112. Information to be furnished by employer.—Every employer shall furnish the commission, upon request, any information required by it to carry out the provisions of this chapter. The commission, a commissioner, deputy commissioner, or any person deputized by the commission for that purpose, may examine under oath any employer, officer, agent or employee. An employer or an employee receiving from the commission a blank with directions to file the same shall cause the same to be properly filled out so as to answer fully and correctly all questions therein, or if unable to do so, shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the commission within the period fixed by the commission therefor.

§ 113. Inspection of records of employers.—All books, records and payrolls of the employers showing or reflecting in any way upon the amount of wage expenditures of such employers shall always be open for inspection by the commission or any of its authorized auditors, accountants or inspec-

tors for the purpose of ascertaining the correctness of the wage expenditure and number of men employed and such other information as may be necessary for the uses and purposes of the commission in the administration of this chapter.

§ 114. Interstate commerce.— The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees.

§ 115. Penalties for false representation.— If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or any other person, any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor.

§ 116. Limitation of time.— No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend.

§ 117. Duties of commissioner of labor.— The commissioner of labor shall render to the commission any proper aid and assistance by the department of labor as in his judgment does not interfere with the proper conduct of such department.

§ 118. Unconstitutional provisions.— If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

§ 119. Actions or causes of action pending.— This act shall not affect any action pending or cause of action existing or which accrued prior to July first, nineteen hundred and fourteen.

ARTICLE 7

Laws Repealed; When to Take Effect

Section 130. Laws repealed.
131. When to take effect.

§ 130. Laws repealed.— Article fourteen-a and sections two hundred and fifteen to two hundred and nineteen-g, both inclusive, of chapter thirty-six of the laws of nineteen hundred and nine, as amended by chapter six hundred and seventy-four of the laws of nineteen hundred and ten, are hereby repealed.

§ 131. When to take effect.— This chapter shall take effect immediately, provided that the application of this chapter as between employers and employees and the payment of compensation for injuries, to employees or their dependents, in case of death, shall take effect July first, nineteen hundred and fourteen, but payments into the state insurance fund may be made prior to July first, nineteen hundred and fourteen.

§ 2. This act shall take effect immediately, except as provided in section one hundred and thirty-one as re-enacted hereby.

APPENDIX "B."

According to a schedule and chart, set forth at pp. 8-10 of Bulletin No. 7 (whole number 185) of the Bureau of Labor Statistics in the Federal Department of Labor, issued October, 1915, workmen's compensation or insurance laws, as enacted by thirty-one of the several states and territories, may be classified as follows:

Compensation, Elective.

Alaska.
Colorado.
Connecticut.
Illinois.
Indiana.
Iowa.
Kansas.
Louisiana.
Maine.
Michigan.
Minnesota.
Montana.
Nebraska.
New Hampshire.
New Jersey.
Pennsylvania.
Rhode Island.
Vermont.
Wisconsin.

Compensation, Compulsory.

Arizona.
California.
Maryland.
New York.
Oklahoma.

Insurance, Elective.

Massachusetts.
Nevada.
Oregon.
Texas.
West Virginia.

Insurance, Compulsory.

Ohio.
Washington.
Wyoming.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff in error,

vs.

JAMES WINFIELD

October Term, 1915.
No. [redacted] 32

In error to the Supreme Court, Appellate Division, Third Judicial Department of the State of New York

Brief of the New York State Industrial Commission

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E. CLARENCE AIKEN,
HAROLD J. HINMAN,
Of Counsel

INDEX OF AUTHORITIES CITED

Case.	PAGE
Asbell v. Kansas, 209 U. S. 251	6
Charlotte R. R. Co. v. Gibbes, 142 U. S. 386	14
Chiles v. Ches. & Ohio Ry. Co., 218 U. S. 71	7
Hammill v. Penn. R. R. Co., 94 Atl. 313	10
Harper on Workmen's Compensation, p. 125.	4
Minn., Kans. & Texas Ry. Co. v. Haber, 169 U. S. 613	6
Minnesota Rate Cases, 230 U. S. 252	7
Reid v. Colorado, 187 U. S. 137	6
Savage v. Jones, 225 U. S. 501	5
Seaboard Air Line v. Horton, 233 U. S. 492	5
Sherlock v. Alling, 93 U. S. 99	8
Winfield v. Erie R. R. Co. (N. J.)	11

Supreme Court of the United States.

NEW YORK CENTRAL RAILROAD COMPANY, *Plaintiff-in-Error,* *against* JAMES WINFIELD.	October Term, 1915

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK

Brief of the New York State Industrial Commission

STATEMENT OF THE CASE

This is a writ of error to review a judgment of the Court of Appeals which affirmed an award of the Appellate Division of the Supreme Court, which in turn affirmed an award of the Workmen's Compensation Commission of New York which awarded compensation to James Winfield in the sum of $13.08. Winfield was employed by plaintiff-in-error in connection with the general repair and maintenance of main line tracks on the West Shore railroad in the State of New York near Lake Katrine. He was struck in the

right eye by a stone while tamping ties, causing an ulcer of the cornea.

A general argument has been made on the constitutionality of the Workmen's Compensation Law in the case of *Southern Pacific Company, Plaintiff-in-Error*, v. *Marie Jensen*, argued herewith. The only additional argument to be made will be on the point raised by the plaintiff-in-error, that the Federal Employers' Liability Law is exclusive and that the Workmen's Compensation Commission has no jurisdiction in this case.

The plaintiff-in-error does not correctly state the State Fund premium fixed for railroad employees; $14.85 per $100 was the rate from July 1, 1914, to December 31, 1914. Since January 1, 1915, it has been as follows: $5 per hundred for construction work and $10 per hundred for operation. So that the amount payable by railroads provided they are insured in the State Fund would be only about half that stated in the brief of the plaintiff-in-error. The law moreover gives the railroads the option to operate as self-insurers, and thus reduce the amount payable by them to actual losses.

In the brief of counsel for the plaintiff-in-error it is suggested that it would be palpable injustice to make a railroad liable for injury or death of an employee in all cases (pp. 17–18), and that such a result would be accomplished if it were held that railroads were liable under the State Compensation Law for injury or death without negligence and under the Federal Liability Law for injury or death due to negligence. We cannot accept that point of view. The State has passed a general law applicable to all employees

engaged in hazardous occupations. It is conceded that the business of railroading is extra-hazardous. The result of the contention of the railroad companies would be to make an exception of their employees, so that while the 180,000 employers of the State outside of the railroads are subject to the provisions of the Compensation Law and liable for all injuries arising out of and in the course of the employment, over half of the employees of railroads would be without any such protection. It would be a palpable injustice that such a discrimination should be made in favor of the railroads which have the most hazardous occupation of all.

POINTS

I

THE FEDERAL EMPLOYERS' LIABILITY LAW IS NOT EJUSDEM GENERIS AS THE WORKMEN'S COMPENSATION LAW, AND SO DOES NOT APPLY TO OUST THE WORKMEN'S COMPENSATION COMMISSION OF JURISDICTION.

If every man who handles a pick on the railroads of this State is engaged in interstate commerce, then all the great railroads are exempt from the operation of this act unless it shall be held, as we maintain it should be, that the Federal Employers' Liability Law is of a different nature than the State Workmen's Compensation Law.

When Congress has once taken action upon a subject within its jurisdiction, under the interstate commerce clause of the Constitution, it seems to be settled that the United States statute supersedes any law on the same subject; but until such action by Congress the State has power to act. Congress might pass a workmen's compensation law applicable to interstate commerce carriers. This it has not done. It has passed a workmen's compensation law applicable to Federal employees. By so doing it has recognized the distinction between liability statutes and compensation statutes. Under the liability statutes it is necessary to prove negligence as at common law. Under the compensation statutes liability to pay results solely from the accident or injury.

Mr. Harper, in his book on Workmen's Compensation, at page 125, says:

> "It would seem to be clear that, at least in those cases in which the Federal law did

> not purport to give relief, viz., non-negligence cases, it should not be held to supersede the State compensation law, which is expressly designed to cover just such cases * * *. When Congress has legislated in reference to just such cases, then, of course, in accordance with recognized principles, such legislation would be held exclusive. Until such time those cases with which the Federal law has nothing to do should be held to be covered by the State compensation law, if otherwise within its terms."

Giving due effect to both the Federal statute on employer's liability and our State Workmen's Compensation Law, the latter is justifiable and can be sustained in so far as it applies to injuries arising in the absence of negligence. Such a construction harmonizes the two statutes.

The cases seem to be clear that the State law will be upheld unless the repugnance or conflict between the State and national acts is direct and positive, so that the two acts cannot be reconciled or consistently stand together.

In *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492, Mr. Justice Pitney says:

> "To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the comon law rule, certainly the Act now limits the responsibility of the company as indicated."

In the case of *Savage* v. *Jones*, 225 U. S. 501, Mr. Justice Hughes, in interpreting the Food and

Drugs Act passed by Congress in its relation to a law of Indiana in reference to commercial feeding stuffs, says:

> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

And with reference to the act in question he says:

> "Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That State has determined that it is necessay in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect."

Then there are several cases which deal with what is known as the Animal Industry Act, passed by Congress, which it was contended came in conflict with State regulations upon the same subject.

Minn., Kans. & Texas Ry. Co. v. *Haber*, 169 U. S. 613.
Reid v. *Colorado*, 187 U. S. 137.
Asbell v. *Kansas*, 209 U. S. 251.

In the case of *Reid* v. *Colorado* the court says:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said — and the principle has been often reaffirmed — that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress and therefore is not inconsistent with that act."

In the case of *Chiles* v. *Ches. & Ohio Ry. Co.*, 218 U. S. 71, this court recognized the right of a railroad company to require separate compartments for white and colored passengers on interstate trains.

In the *Minnesota Rate Cases*, 230 U. S. 352, 402, 410, Mr. Justice Hughes discusses the relation between State and national governments in reference to matters over which each has or may have jurisdiction. He says:

> "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious

and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency."

Further, at page 410, he says:

"Again, it is manifest that when the legislation of the State is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce."

In *Sherlock* v. *Alling*, 93 U. S. 99, the United States Supreme Court held that until Congress made some regulation touching the liability of

parties for marine torts resulting in the death of persons injured, the statute of Indiana, giving a right of action to personal representatives of the deceased, applied and constituted no encroachment upon the commercial power of Congress.

This is a clear case holding that Congress must take the precise field. The claim was made in that case that, as by common and maritime law the right of action for personal torts died with the person injured, the Indiana statute enlarged the liability of persons for such torts, and that such enlarged liability, if applied to cases of maritime torts, would constitute a new burden upon commerce. The court reviewed the decisions on this subject and called attention to the fact that the State legislation which had been adjudged invalid had imposed a tax or license fee or created an impediment to navigation or prescribed conditions under which commerce had to be conducted. The Supreme Court said that the increased liability in the *Sherlock* case created no such tax and in no respect interfered with navigation; that the statute only declared general principles respecting liability for torts resulting in the death of parties injured; that it was general legislation and, as such, not open to valid objection because it might affect persons injured in interstate commerce.

In that case the court said:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country." (p. 103.)

The same reasoning which permitted this enlarged liability in death cases in the *Sherlock* case applies to the existing situation here under the compensation theory of the State statute until Congress takes the field away from the State.

Payment of premiums into the State fund in conjunction with others engaged in the same or other hazardous occupations, or the adoption of the alternative methods of insurance, establishes a liability which, unless obnoxious to some other constitutional provision, should be sustained under the commerce clause, just as the United States Supreme Court sustained the Indiana statute making a new rule of liability in death cases.

This view of the situation has been taken by the Supreme Court of New Jersey in a decision sustaining the compensation act of that state, rendered June 4, 1915, in the *Matter of Hammill* v. *Pennsylvania Railroad Co.*, 94 Atlantic, 313, in which, at page 314, the court said:

> "Again, the Federal and State acts are not *in pari materia*. The one is an act creating liability to an employe as in tort, based upon common-law negligence, or the failure to comply with some statutory provision for the safety of the employe; the other, so far as its section 2 is concerned, is a compensation act, purely contractual in character, and requiring compensation for injury or death to be made as incident of the mere relation and quite irrespective of any question of negligence on the part of the employer. It was manifestly intended, among other things, to give relief in just such cases as the present one, where no claim of negligence on the part of the employer could reasonably be made. As to this

class of cases at least, we deem the federal act not to be exclusive. The authorities cited by prosecutor will be found to involve in each case a conflict between the federal act and a state act imposing a liability as in tort for breach of a statutory or common-law duty."

The Court of Errors and Appeals of New Jersey, in the case of *Winfield* v. *Erie Railroad Company*, have also held that the Federal Liability Act does not apply to compensation cases. Chief Justice Gummere says:

"We do not find it necessary to determine whether the appellant's decedent came to his death while employed by the defendant in inter-state commerce as the Supreme Court held, or while employed in intra-state commerce, as was found by the Court of Common Pleas, but will assume for the purpose of deciding this appeal, that the conclusion of the Supreme Court as to the character of his employment was justified by the facts proved.

"The question then is whether the widow of an employee of a common carrier by a railroad which is engaged in inter-state commerce, who comes to his death while he is employed by such carrier in such commerce, must in all cases bring her action to recover compensation under the Federal Employer's Liability Act. This question we think must be answered in the negative."

II

HOW IS THE STATE AFFECTED?

Congress has passed a Federal Safety Appliance Law, and the State has passed factory laws for adoption of safety devices to prevent accidents, but, still, accidents will happen. When a man is injured or killed, he, himself, or his family, after they exhaust all the accumulative resources which they have, must fall back upon the State, and the State is under obligation to look after and care for its dependent poor. It has attempted to discharge this obligation by poor laws. The almshouse is the last relief that any self-respecting man would seek, not because it is State relief, but because of his self-respect. The obligation of the State has been discharged, therefore, in a manner to make it inacceptable to a self-respecting citizen. The State has the power, and it has the duty to discharge this obligation to its unfortunates and poor, in a manner compatible with the dignity of citizenship.

The duty of administering the poor laws places upon the State a tremendous financial burden. With the introduction of modern machinery, certain industries have become constantly hazardous to those working in them. These industries, therefore, are placing upon the State a constantly increasing burden to care for those whose injuries have disabled them from earning a livelihood. A workman who is disabled from working for more than a comparatively short period, has the immediate prospect of having to require State aid. However inadequately such State aid has been theretofore furnished, his right to it, such as it is, is undoubted, and his demand for it must be met.

There are two ways, among others, by which

the State could meet this demand; it could furnish institutions of such a character that not only would the disabled workman be taken care of during his period of disability, but also those who depended upon him; and facilities could be furnished for the development of his children by the way of schools and religious training, so that when his period of disability ceased, he may be restored to the community with full efficiency, and with no deterioration in the organization of his family. It would be competent for the State to do this. The objection, however, to such a system is practical and very obvious. The expense would be enormous; there would be a duplication of facilities with respect to schools and churches, which are already amply supplied to the public, and there would be a breaking up of neighborhood ties enjoyed by the workman before his disability overtook him.

The other way of meeting this obligation, is for the State to grant pensions to disabled workmen, sufficient in amount to enable them to remain in their homes, to keep their children at school, to retain their neighborhood associations, and to receive the advantages that their own community offers in the way of mental and moral development; and this is exactly what is done by the "Workmen's Compensation Law." In fact, the law might better be called the "Workmen's Pension Law." This is an economical and enlightened method of State aid.

> "There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed, as much as the parties themselves. Thus in opening, widening or improving streets, the

owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So also in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination, is a part of all quarantine systems. (*Morgan* v. *Louisiana*, 118 U. S. 455, 466). So the expense of a compulsory examination of a railroad engineer to ascertain whether he is free from color blindness has been held to be properly chargeable against the Railroad Company. (*Nashville, Chattanooga & St. Louis Railway* v. *Alabama*, 128 U. S. 96, 101.)

The foregoing appears in the opinion of Mr. Justice Field in *Charlott, etc., Railroad Co.* v. *Gibbes*, 142 U. S. 386. The theory is that a burden has been put on the State of a distinct character, and the expense of the burden may be assessed directly on those whose business create it.

Similarly, the State of Connecticut assesses against the railroad companies the expenses of its public service commission. So there is ample warrant in law for the shifting of the burden of State aid from the State to the industries, which of necessity give rise to the burden.

The burden of assuming the care of injured employes or their families in case of want, is a burden which cannot be assumed by the Federal Government. It is peculiarly a State function, and, therefore, its scope and purpose is outside of, and distinct from, the Federal Liability Law passed by Congress.

III

SO FAR AS THE PROVISIONS OF THE WORKMEN'S COMPENSATION LAW HAVE BEEN CONSTRUED BY THE HIGHEST COURT OF THE STATE, THE UNITED STATES SUPREME COURT WILL FOLLOW SUCH CONSTRUCTION AND INTERPRETATION.

Fairchild v. *Gallatin Co.*, 100 U. S. 47.
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100.

Counsel for the plaintiff-in-error contend that the Workmen's Compensation Act itself precludes an award in this case (pp. 34–37), basing that argument on the construction of section 114 of the Compensation Act. The Court of Appeals construed this section as allowing compensation to employees engaged in interstate commerce where there is no negligence (transcript, pp. 48–49). Counsel also cite the case of *Connole* v. *Norfolk & W. Ry. Co.*, 216 Fed. 823, and state that the Ohio act which that case construed was practically identical with section 114 of the New York Workmen's Compensation Law. While the wording is the same except as to two words, those two words change the whole meaning of the Ohio act. These words are " then only " and they limit the applicability of the Ohio act to those who have made an agreement only as to compensation. In other words, the Ohio act limits the application of the law, while the New York statute extends it by providing that it shall cover cases of interstate commerce except where Congress has passed a law

providing a rule of liability or method of compensation, and also further that even in such cases the employer and employee working only in the State may agree to become bound by the provisions of the compensation law. In the Ohio statute it is only in the latter case that the compensation law can apply.

Respectfully submitted,

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Of Counsel.

NEW YORK CENTRAL RAILROAD COMPANY *v.* WINFIELD.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 321. Argued February 29, March 1, 1916; restored to docket for reargument November 13, 1916; reargued February 1, 1917.—Decided May 21, 1917.

The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and, Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the federal act provides no remedy.

Therefore, an award made under the New York Workmen's Compensation Act for injuries not attributable to negligence, which were received by an employee of an interstate railroad carrier while both were engaged in interstate commerce, cannot be upheld.

168 App. Div. 351; 216 N. Y. 284, reversed.

THE case is stated in the opinion.

Mr. Frank V. Whiting and *Mr. Robert E. Whalen*, with whom *Mr. H. Leroy Austin* and *Mr. William L. Visscher* were on the brief, for plaintiff in error.

Mr. E. Clarence Aiken, with whom *Mr. Egburt E. Woodbury*, Attorney General of the State of New York, and *Mr. Harold J. Hinman* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

While in the service of a railroad company in the State of New York, James Winfield sustained a personal injury

whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault or negligence of the carrier, or of any of its officers, agents or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track and while tamping cross-ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the State [1] and an award was made to him by the state commission, one member dissenting. The carrier appealed and the award was affirmed by the Appellate Division of the Supreme Court, two judges dissenting, 168 App. Div. 351, and also by the Court of Appeals, 216 N. Y. 284. Before the commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed exclusively by the Employers' Liability Act of Congress, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, and therefore that no award could be made under the law of the State. That insistence is renewed here.

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.[2] Congress acted

[1] See *New York Central R. R. Co.* v. *White*, 243 U. S. 188.

[2] *Second Employers' Liability Cases*, 223 U. S. 1, 53–55; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156; *Taylor* v. *Taylor*, 232 U. S. 363; *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine*, 239

upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield* v. *Erie R. R. Co.*, 88 N. J. L. 619, hold that the act relates only to injuries resulting from negligence, while the California court in *Smith* v. *Industrial Accident Commission*, 26 Cal. App. 560, and the Illinois court in *Staley* v. *Illinois Central R. R. Co.*, 268 Illinois, 356, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 378–379. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. *Second Employers' Liability Cases*, 223 U. S. 1, 51. It was drafted and passed shortly follow-

U. S. 52; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; *Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Southern Ry. Co.* v. *Railroad Commission*, 236 U. S. 439.

ing a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. Cong. Rec., 60th Cong., 1st sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States. House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st sess. Thus, in the House Report it is said: "It [the bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States."

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the States free to require compensation where the act withholds it. By declaring in § 1 that the carrier shall be liable in damages for an injury to the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier,

or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track," etc.,[1] the act plainly shows, as was expressly held in *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents or other employees. The same principle is seen also in § 3, which requires that where the carrier and the employee are both negligent the recovery shall be diminished in proportion to the employee's contribution to the total negligence, and in § 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service in which he is employed. A few years after the passage of the act a legislative commission drafted and the Committees on the Judiciary in the two houses of Congress favorably reported a bill substituting the latter principle for the other, Senate Report No. 553, 62d Cong., 2d sess., House Report No. 1441, 62d Cong., 3d sess., but that bill did not become a law.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576, and other cases, it is pointed out that the subject which the act covers is "the responsibility of

[1] The act is printed in full in *Second Employers' Liability Cases*, 223 U. S. 1, 6–10.

interstate carriers by railroad to their employés injured in such commerce"; in *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 66, 67, it is said that "we may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury," that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employés injured while engaged in interstate commerce," and that it is "paramount and exclusive"; in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 256, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce the federal act governs to the exclusion of the state law; in *Seaboard Air Line Ry.* v. *Horton*, *supra*, pp. 501, 503, it is said not only that Congress intended "to exclude responsibility of the carrier to its employés" in the absence of negligence, but that it is not conceivable that Congress "intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employés, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;" and in *Wabash R. R. Co.* v. *Hayes*, 234 U. S. 86, 89, it is said: "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [citing cases]. On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling."

The act is entitled, "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," and the suggestion is made that the words "in

certain cases" require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in "commerce between any of the several States," etc. See *Employers' Liability Cases*, 207 U. S. 463.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the

States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

It follows that in the present case the award under the state law cannot be sustained.

Judgment reversed.

MR. JUSTICE BRANDEIS, dissenting.

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908, Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words the majority of the court declares, that Congress by passing the Employers' Liability Act prohibited States from including within the protection of their general Workmen's Compensation Laws employees who *without fault on the railroad's part* are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The Workmen's Compensation Law of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly

may be regarded as coming within the category of police regulations." *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 207. And this court has definitely formulated the rules which should govern in determining when a federal statute regulating commerce will be held to supersede state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Sherlock* v. *Alling*, 93 U. S. 99, 103.

2. "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage* v. *Jones*, 225 U. S. 501, 533.

3. "The question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 623.

Guided by these rules and the cases in which they have

been applied [1] we endeavor to determine whether Congress in enacting the Employers' Liability Act intended

[1] The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the States of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the federal legislation.

1. In *Sligh* v. *Kirkwood*, 237 U. S. 52, 62, it was held that the Federal Food and Drugs Act, dealing, among other things with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition, did not prevent a State from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, 293, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts, dealing with the equipment of locomotives, as well as of cars, and the Act to Regulate Commerce, preclude the States from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 420, it was held that the Carmack Amendment (34 Stat. 584, 595), regulating the carrier's liability for loss of interstate shipments, did not prevent a State from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In *Savage* v. *Jones*, 225 U. S. 501, 529, it was held that the passage by Congress of the Food and Drugs Act of 1906, which, among other things, prohibited misbranding, did not prevent the States from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623, it was held that Congress, by granting, in the Act to Regulate Commerce, power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit States from legislating on the subject.

6. In *Asbell* v. *Kansas*, 209 U. S. 251, 257, it was held that Congress, in providing that a certificate of inspection issued by the National Bureau of Animal Industry should entitle cattle to be shipped into any State without further inspection, did not prevent a State from penalizing the importation of cattle which had not been inspected either by the federal bureau or by designated state officials.

to prevent States from entering the specific field of compensation for injuries to employees arising *without fault*

7. In *Crossman* v. *Lurman*, 192 U. S. 189, 199, it was held that the Act of Congress of August 30, 1890, 26 Stat. 414, prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the States from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibitions of their statutes.

8. In *Reid* v. *Colorado*, 187 U. S. 137, 149, it was held that Congress, by making it an offence under the Animal Industry Act for anyone to send from State to State cattle known to be affected with communicable disease, did not prevent the States from penalizing the importation of cattle without inspection by designated state officials.

9. In *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 623, it was held that the Federal Animal Industry Act, making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a State from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In *Smith* v. *Alabama*, 124 U. S. 465, 482, it was held that Congress did not, by the passage of the Act to Regulate Commerce, prohibit the States from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In *Sherlock* v. *Alling*, 93 U. S. 99, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases, prohibit the application to an accident in navigable waters of a State of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act supersedes the common or statutory laws of the States relating to the liability of railroads for negligent injuries to their employees while engaged in interstate commerce, are, of course, wholly consistent with the cases above referred to, the "field" of both federal and state laws there under consideration being identical: *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576; *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 66; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702, 704; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156; *Taylor* v. *Taylor*, 232 U. S. 363, 368; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501; *Wabash R. R. Co.* v. *Hayes*, 234 U. S. 86, 89; *Toledo, St. Louis & Western R. R. Co.* v. *Slavin*, 236 U. S. 454, 458; *St.*

on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any, which in terms express that will. We enquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope and purpose; and, on the other, at the nature, methods and means of state Workmen's Compensation Laws. If the will is not clearly expressed in words we must consider all these in order to determine what Congress intended.

First—As to words used: The act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of the act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act Relating to the liability of common carriers by railroad to their employees in certain cases." [1]

Louis, Iron Mountain & Southern Ry. Co. v. *Craft*, 237 U. S. 648; *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine*, 239 U. S. 52, 54; *Chicago, Rock Island & Pacific Ry. Co.* v. *Wright*, 239 U. S. 548, 551; *Seaboard Air Line Ry.* v. *Kenney*, 240 U. S. 489, 493; *Osborne* v. *Gray*, 241 U. S. 16, 19.

[1] The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910, 36 Stat. 884, proposing a Federal Workmen's Compensation Law, which reads: "A bill to provide an exclusive remedy

Second—As to specific action taken: The power exercised by Congress is not such that, when exercised, it *necessarily* excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the States. Between the federal and the state law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third—As to origin, purpose and scope of the Employers' Liability Act and the nature, methods and means of state Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) *The origin of the Federal Employers' Liability Act:*

By the common law as administered in the several States, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work; subject only to the right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of *respondeat superior*. This legal liability, which in theory applied between employer and employee as well as between others, came, in course of

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and compensation for accidental injuries resulting in disability or death, to employees of common carriers by railroad engaged in interstate or foreign commerce, or in the District of Columbia, and for other purposes." Sen. Doc. 338, p. 107, 62d Cong. 2d sess.

time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk and of contributory negligence—rose and flourished. When applied to huge organizations and hazardous occupations, as in railroading, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread. But the opponents were alert, potent and securely entrenched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act (Act of June 11, 1906, 34 Stat. 232), fifty years elapsed. In those fifty years only four more States had wholly abolished the defense of fellow servant's negligence. Furthermore, in only one State had a statute been passed making recovery possible, where the employee had been guilty of contributory negligence.[1] Meanwhile, the num-

[1] At the time the first Federal Employers' Liability Act was passed the so-called common law defenses remained in force, in large part, in most of the States, as to railroad employees.

A. *The Fellow Servant Rule.* (See Compilation of Statutes in "Liability of Employers," Senate Hearings, 1906, pp. 183–288; and in Senate Document No. 207, 60th Congress, 1st sess.)

(1) It had been completely abolished as to railroad employees in only 5 States: Georgia (1856), Kansas (1874), North Carolina (1897), Colorado (1901), North Dakota (1903).

(2) It remained in full force, or substantially so, in 25 States or Territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

ber of accidents to railroad employees had become appalling. In the year 1905–6 the number killed while on duty was 3,807, and the number injured 55,524.[1] The promoters of remedial action, unable to overcome the efficient opposition presented in the legislatures of the several States, sought and secured the powerful support of the President.[2] Congress was appealed to and used its power

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(3) In 16 other States it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first federal act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania and Wisconsin.

B. *Contributory Negligence.* (See compilations cited, *supra.*)

(1) In all but 1 State there had been no statutory change of the rule that contributory negligence constituted a complete defense. Georgia (1895) had substituted the comparative negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The common law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first federal act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several States introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

C. *Assumption of Risk.* (See the compilations cited, *supra.*)

The harshness of this rule had been mitigated by statute or other statutory action taken in only 14 States: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

[1] See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

[2] President's Messages, December 2, 1902; December 6, 1904; December 5, 1905; January 31, 1908.

over interstate commerce to afford relief. The promotion of safety was of course referred to in the Committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.[1] There was, in the nature of things, no more reason for providing a federal remedy for negligent injury to employees than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances

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[1] The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety. These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several States, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its reports for eleven years ending October, 1908, no reference has been found, either in the annual President's address, or in the report of the Committee on Legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218–233, which is devoted to a consideration of harmonious or uniform legislation. It contains a résumé of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during a period of 19 years and attendances at congressional hearings on safety appliances, block signal, and hours of labor legislation.

attending its passage were such as to preclude the belief that thereby Congress intended to deny to the States the power to provide for compensation or relief for injuries not covered by it.

(B) *The scope of the Federal Employers' Liability Act:*

(1.) The act leaves uncovered a large part of the injuries which result from the railroads' negligence. The decision of this court in the first *Employers' Liability Cases*, 207 U. S. 463, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees *engaged* in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the federal law. For the act was held to apply only to those *directly* engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work *for* interstate commerce, as in repairing engines or cars—are not directly engaged *in* it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, *happen* to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce.[1]

(2.) The act leaves uncovered all of the injuries which result *otherwise* than from the railroad's negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the States

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[1] Compare *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473; *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303; *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43.

the power to provide compensation or relief for injuries not covered by it.

(C) *The purpose of the Employers' Liability Act:*

The facts showing the origin and scope of the act discussed above indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence—a right denied under judicial decisions through the interposition of the defenses of fellow-servant, assumption of risk and contributory negligence. It was not the purpose of the act to deny to the States the power to grant *the wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common-law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer, under the federal act as at common law, is merely a penalty for wrong doing. The remedy assured to the employee is merely a more efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the States the power to provide compensation or relief for injuries not covered by the act.

(D) *The nature of Workmen's Compensation Acts:*

In the effort to remove abuses, a study had been made of facts; and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread, that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing

with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation; even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, coöperative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed. Thus out of the attempt to enforce individual justice, grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1908, these truths had gained little recognition in the United States. Not one of the thirty-seven States or Territories which now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted

in the following month (Act of May 30, 1908, 35 Stat. 556). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress by simply passing the Employers' Liability Act prohibited the States from providing in *any* way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him; even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls directly the far heavier burden of the demoralization of its citizenry, and of the social unrest, which attend destitution and the denial of opportunity. Upon the State also rests under our dual system of government the duty owed to the individual to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the States the power to perform either this duty to humanity or their fundamental duty of self-preservation. And if the States are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) *Methods and means of Workmen's Compensation Laws:*

The principle underlying Workmen's Compensation Laws is the same in all the States. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums

to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several States do and properly may differ radically.

What methods and means the State shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate, rests (subject to constitutional limitations) wholly within the judgment of the State. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing against the financial consequences of accidents through contributing an adequate amount to an accident insurance fund. It might conclude that it was wise to make itself the necessary contributions to such a fund, out of monies raised from general taxation. Or it might conclude, as the State of Washington did, that the fairest and wisest form of taxation for the purpose was to impose upon the employer directly the duty of making the required contributions—relying upon the laws of trade to effect, through the medium of transportation charges, an equitable distribution of the burden. The method last suggested is pursued in substance also by the State of New York. In its essence the laws of the States are the same in this respect, as is shown in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219. It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. And the right

of the employee is as free from any suggestion of wrong done to him as the new right granted by Mothers' Pension Laws.

(F) *Federal and State legislation are not in conflict.*

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a state compensation law—affords, of course, no reason for imputing to Congress the will to deny to the States power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce.[1] Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the States (which alone can deal comprehensively with it) the whole subject of indemnity and compensation for injuries to employees whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the States this power. The subject of compensation for

[1] The number of cases on the October 1915 term of this court was 1069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in *inter*state commerce or *intra*state commerce. In 52 of the cases the question was presented whether there was evidence of negligence on the part of defendant. In 24 of the cases the question was also presented whether or not the employee had assumed the risk.

accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. In a large majority of instances they reside in the State in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States, in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, preëmpted the whole field—has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to state action was far less clear than under the circumstances here considered. Tested by those decisions and by the rules which this court has framed for its guidance, I am of opinion, as was said in *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, 294, that: "The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily

hazardous occupation [1] and otherwise unprovided for the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action.

MR. JUSTICE CLARKE concurs in this dissent.